# Supreme Court of United States.

No. 266.

CATHERINE A. RODD, ADMINISTRATRIX

*Of the Succession of Edward Rodd et Als.*

*versus*

H. G. HEARTT, D. C. McCAN, ET ALS.

*And the proceeds of sale of Steamer Lotawanna.*

John A. Grow

L. MADISON DAY. *Attorney for Appellees.*

CLARK & HOFELINE, PRINT, 9 BANK PLACE, NEAR GRAVIER,

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This is an appeal by Catherine A. Rodd, Administratrix of the Succession of Edward Rodd et als., from a decree rendered by the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, on the 3d of June, 1872, and signed on the same day, in the case of William Doyle vs. Steamer Lotawanna.

The facts of the case as shown by the record are, that the steamer Lotawanna was libelled in the U. S. District Court for the District of Louisiana, on the 10th of June, 1871, by Wm. Doyle and others for crews' wages, and taken possession of by the U. S. Marshal, by process from that Court, on the same day. See libel and return to warrant, Rec. pp. 1 to 3.

On the 17th of June, 1871, an order was rendered to sell the boat after the expiration of the monition—Rec. page 14. A venditioni exponas was subsequently issued, (Rec. p. 45) and the boat sold for $7,500. See Commissioner's Report, Rec. p. 99.

About forty-five parties filed intervening libels, claiming various sums due to them for wages, supplies, materials, and repairs made on the boat, amounting in the aggregate, exclusive of those for wages, to $10,551.98. See Commissioner's Report, Rec. pp. 99 to 101.

On the 19th June, 1871, a libel of intervention was filed by Catherine Ann Rodd, Administratrix of the Succession of E. W. Rodd, John E. Rodd, James T. Rodd, forming the late commercial firm of E. W. Rodd & Sons; Arthur Poincy and Benjamin Poincy, composing the commercial firm of A. Poincy & Son; Michael Shelly and William O. Hern, composing firm of M. Shelly & Co.; Theophilus Prudhomme and John F. Grace, composing commercial firm of Prudhomme & Grace; George Martin, William Dillon, Henry Lawler, and Wm. H. Shelly, composing commercial firm of Lawler & Shelly; all residing in the City of New Orleans, claiming that Henry G. McComas, being then the owner and in possession of the steamboat Lotawanna, did, by a public act before F. B. Earhart, Notary Public, grant a mortgage in favor of their firms on the steamer Lotawanna, to secure the payment of fourteen notes, all made by H. G. McComas, and dated New Orleans, 20th May, 1871, and payable at six and nine months after date, at the Bank of America, and paraphed *Ne Varietur* to identify them with said act of mortgage: two of said notes which were for different amounts being held by each of said firms. This libel was sworn to by but one person, Wm. O. Hern, a member of the firm of M. Shelly & Co. See libel, Rec. pp. 14 and 15.

The act of mortgage referred to will be found Rec. pp. 16 to 19.

The fourteen notes are set forth verbatim from Rec. pp. 19 to 23: they are the personal obligations of H. G. McComas, in no way connected with the steamer Lotawanna or her business.

On the 7th of December, 1871, the case was referred by the Court to J. B. Weller, U. S. Commissioner, to examine and report upon a tableau of distribution according to law. Rec. page 98.

On the 23d of January, 1812, the Commissioners filed a report, in which after deducting the claims of the crew of the vessel for wages, and also the costs amounting to the sum of $2411.58, he reported paying the balance of the proceeds of sale, $5088.42, pro rata among the intervening creditors, thirty-four in number, for supplies, materials and repairs furnished to the boat, whose claims amounted to $10551.98, giving them 48 1-5 per cent. In this report he rejects the claims of the mortgage creditors, E. W. Rodd & Son et als., for $14,913, on the ground that the evidence showed that they were for merchandize obtained for speculative purposes: in other words to freight his vessel, and from the sale of which he expected to derive great profits. See Commissioner's Report and Classification of Claims, Rec. pages 99 to 102.

On the 24th of January, 1872, P. B. Foulk, styling himself administrator of the Succession of H. G. McComas, filed an opposition to the report of the Commissioner, and asking that the proceeds of the boat after paying crews' wages and costs, be turned over to him; (Rec. pp. 105-6) he had filed no claim as required by the rules of this court. As this claim was rejected and no appeal taken by this party from the decree we will not revert to it again.

On the 27th of January, 1872, Catherine Ann Rodd filed a petition, asking that the proceeds of the boat be paid to her and the other mortgage creditors. Rec. pp. 106-7.

On the 29th of January, 1872, an exception was filed to this report by John Raymond, owner of the steamer Frolic, on the ground that his claim for $400 was for salvage, and that it should have been placed among the first class creditors. See Exception, Rec. p. 107.

On the 3d of February, the Court ordered the claims of the crew and costs to be paid. See decree, Rec. pp. 107 and 108.

On the 26th of February, 1872, the Court rendered a decree rejecting the Commissioner's report, and decreeing that after deducting mariners' claims, and costs previously allowed, amounting to $2411.58, and the claim of the steamer Frolic, $400 for salvage, and additional costs of Marshal, $44: the balance, $4644.45 to be applied to the claim of Catherine Ann Rodd, Administratrix, and the other mortgage creditors. See decree, Rec. page 108.

On the 1st of March, 1872, all the intervening libellants joined in a motion for an appeal with supersedeas to the Circuit Court for the Fifth Circuit and District of Louisiana, which was granted on their giving bond in the sum of $6000. Rec. pages 108 and 109.

On the 5th of March, 1872, the bond was filed in compliance with the order of Court. Rec. pp. 110 and 111.

After this appeal was taken and allowed, H. G. Heartt made a motion to be paid $156.50 for appraiser's fees; (Rec. p. 12) this rule was made absolute, (Rec. p. 113) and an appeal taken from the decree allowing it. Rec. pages 113 and 114..

These appeals were regularly filed in the U. S. Circuit Court. Record, page 118.

On the 3d of June, 1872, that Court rendered a decree reversing that rendered by the District Court, and recognizing the claims of the mariners and furnishers of supplies and materials as superior to that of the mortgage

creditors, and decreeing that they be paid in preference to the mortgage creditors, and referring the claim to a Commissioner for a new distribution. See decree, Rec. page 119.

On the 6th of June a new tableau of distribution was filed, in compliance with this decree. Rec. pages 119 and 120.

On the 14th of June, 1872, Catherine Ann Rodd and the other mortgage creditors joined in a petition for an appeal to this Honorable Court, which was allowed, returnable on first Monday of December, 1872. See See Rec. pages 121 and 122.

The above is a statement of the case as shown by the record.

The decree of the Circuit Court is clearly correct: it recognizes the claims of the mariners and the furnishers of supplies and material men, as superior to those of the mortgage creditors, and to be paid in preference, and orders a distribution of the proceeds of the boat to be prepared by Commissioner Loew in accordance with these principles. Rec. p. 119.

The distribution made by the Commissioner in accordance with this decree will be found at Rec, p. 120: these are the appellees in this cause.

The testimony in the record shows that the steamer Lotawanna was in the year 1871, engaged in commerce and navigation between the port of New Orleans on the Mississippi, and Jefferson, in the State of Texas, and various intermediate ports and places, carrying freight and passengers for hire, and making on an average about two round trips per month, and that being in the port of New Orleans on various dates in that year, and in need of various supplies, materials, and repairs, the master of the boat applied to and requested these parties to furnish the same for the use of the boat, which they did, as set forth in their detailed bills, annexed and referred to in their several libels of intervention; that the supplies, materials and repairs furnished by them were necessary for the use of the boat to prosecute her voyage, and the credit was given to the boat, and that their several claims are correct in dates, amounts, etc. See testimony in support of these facts, Record, pages 30 to 37, 54, 55, 57 to 67, 71 to 94. These parties had an admiralty lien on this boat for the payment of their several claims, but without the right to proceed *in rem* against the Lotawanna when their claims were filed, in consequence of the 12th rule in Admiralty prescribed by this Court in 1845, in pursuance of the act of 23d August, 1842; they were however claims founded in admiralty contracts, which would necessarily create an implied maritime lien, though denied the process of the Court to enforce it in consequence of this rule; the process

was, however, unnecessary in this case, as the boat had been seized and sold on claims for crews' wages, and her proceeds were in the registry of the Court; but this rule was changed shortly after these claims were filed, and they could now proceed *in rem* against this vessel, and the law and rules of this Court as they now exist must govern, not those that existed when the suit was brought. See the Peggy, 1 Cranch, 231; Abbott's U. S. Practice, 2 vol. 231.

But the general admiralty law has not been changed. It is the same now as it has always been, that an admiralty contract creates an implied maritime hypothecation and lien, and makes no distinction between the cases of domestic and foreign ships, or between supplies furnished in the home port or abroad. See Dig., Lib. 42, 5, 26 and 34; Cassaregis Disc. 18, Ord de la Mar.

Liv. 1, Tit. 14, Art. 16; Domat's Civil Law, B. 3. Tit. 1, § 5; Abbott on Shipping, P. 11, ch. 3, § 10; 1 Valin Com. 363, Consulat de la Mer par Boucher c. 32, 33, 34; Pothier Pand. lib. 42, tit. 5, § 33; Ib. lib. 20, tit. 4. See also the General Smith, 4 Wheat. 338, 443; The Nestor, 1 Sumner, 73, 79; The Stephen Allen, Blatch. & H. Adm. 175, 177; 2 Bells' Com. 525, 526, 528; 2 Brown Civ. and Adm. Law, 142; Roccus de Nav. et Nat., n. 91, 82, 93.

But the process to be used is governed by the rules prescribed by this Court. This doctrine was recognized by this Court in the case of the steamer St. Lawrence, 1 Black, 522, in which Mr. Chief Justice Taney, as the organ of the Court, allowed a material man a lien for supplies furnished in the home port of the vessel, after the repeal of the 12th Rule in Admiralty, not on the ground that the New York statutes gave it, as the State laws could not confer jurisdiction on the United States Courts, but on the ground that the party had an admiralty contract, and his proceedings were commenced before the repeal of the 12th Rule. The Court did not pretend to control the law by adopting the 12th Rule, but only the process of the Court, and that though a party might not be entitled to proceed *in rem* in consequence of the 12th Rule, yet he might have an admiralty lien under the constitution and laws of the United States.

The testimony in the record shows that the claims of Catherine Ann Rodd and the other mortgage creditors, the appellants in the cause, is for merchandize, consisting of sugar, coffee, molasses, flour, corn, potatoes, bacon, etc., purchased by H. G. McComas, from them in large quantities for sale on speculation, in no way connected with the boat or her business

and that the boat did not owe these parties anything to the knowledge of her clerk. These facts are shown by the testimony of the parties themselves. See their testimony and that of the clerk of the boat, R. pages 102 to 105.

Now, so far from these appellants having any claim against the steamer Lottawanna or her proceeds, they had no right to sue in admiralty; their claims are not based upon admiralty contracts, but on an ordinary personal obligation of H. G. McComas, who, they represent, was the owner of the boat, and executed a mortgage on her in their favor, to secure the notes held by them, the consideration of which was as stated above.

Again: The claim of but one of these parties exceed $2000 in amount; this was the claim of Catherine Ann Rodd, administratrix. All the others were for amounts less than $2000, consequently this Court is without jurisdiction as to their claims.

In the case of Bogert vs. The Ship John Jay, 17 Howard, 399, this Court held, that a mortgage creditor could not sue in admiralty to foreclose a mortgage on a vessel. The same doctrine was recognized and followed in the case Schuhart vs. Ship Angeline, 19 H. 239.

The act of Congress, July 29, 1850, (9 U. S. Stat. at Large, 440,) prescribing that no bill of sale, mortgage, hypothecation or conveyance of any vessel or part of any vessel of the United States, shall be valid against any other person than the grantor, or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the Collector of Customs where such vessel is registered or enrolled, does not make this record a lien upon the boat; it only intended to give recorded bills of sale or mortgages of vessels priority over any subsequent conveyance of them, and over any rights acquired on them by general creditors of the owners by judgment or execution, and does not interfere with the liens in favor of material men, given by the general maritime law. See case Am. Law Reg., vol. 3, p. 239.

The only error in the decree of the Circuit Court is in allowing the claim of H. G. Heartt for $156.50 for law charges. This party is not an intervenor, but claims the amount for appraising the boat. The law does not require property seized and sold in admiralty to be appraised. His services if rendered were perfectly useless, and he is entitled to no compensation.

For these reasons we respectfully ask that the decree of the Circuit Court be affirmed, after rejecting the claim of H. G. Heartt for appraisement fees. All of which is respectfully submitted,

John H. Gowen L. MADISON DAY. *Attorney for Appellees.*

# U. S. Supreme Court.

IN ADMIRALTY.

WILLIAM DOYLE ET AL.

*versus.*

STEAMBOAT LOTTAWANNA.

This suit was commenced by certain mariners who had served on the Lottawanna, by a proceeding *in rem*, seeking payment of their wages, but no claim was ever filed or defence made. The boat was sold pending the proceedings, under an order of court, and the proceeds, amounting to $7500, were deposited in the registry.

On the 3rd day of February, 1872, the mariners having obtained a decree for their respective claims, were paid under an order moved for by the proctors for appellants, no objection being made thereto. On the day of , a salvage claim of the steamboat Frolic, was paid under a consent of parties filed March 30, 1872, including the proctors for the appellants, and there now remains in the registry, after deducting the above amounts and cost of court, $4,337.51, which amount is now contended for by the various parties in this Court.

On the 3rd of June, 1872, the decree of the Circuit Court, from which the appeal is taken, was rendered and is as follows: "For reasons orally assigned, it is ordered that the decree of the District Court be avoided and reversed, and it is now ordered, adjudged and decreed by this Court, that the claims of the mariners and of furnishers of supplies and material-men, now be recognized as privileges superior to those of the mortgage creditor, and paid in preference to the latter; and it is further ordered, that a new distribution of the proceeds be prepared by Mr. Commissioner Loew in accordance with the principles herein above laid down."

On the 6th of June, 1872, (Hon. E. H. Durell, District Judge, holding the Circuit Court,) the following was entered: "The Commissioner having submitted a distribution based upon the decree heretofore made by the Court. It is ordered and decreed that the balance of the proceeds of the steamer Lottawanna now in the registry of this Court, be distributed as follows:" and then follows the distribution.

On the 15th of June, 1872, written motion was made and an order entered by Hon. E. H. Durell, District Judge, granting an appeal to this honorable Court.

Motion is made for the dismissal of this appeal on the following grounds:

I. Because there has been no valid appeal granted; the same being granted by the Judge of the District Court. The case being one of original jurisdiction in the District Court, the Judge of that Court could not grant an appeal in the Circuit Court to the Supreme Court.

II. Because the claims of the appellants are all separate and distinct, and the amount in dispute, as far as any one

of them is concerned, is not sufficient to authorize an appeal to this Court.

III. Because the appeal was not made in time to operate as a supersedeas, more than ten days having elapsed from the passing of the final decree to the time of applying for the appeal.

I. Is there any appeal in this case? Can the Judge of the District Court grant an appeal to the Supreme Court of the United States from a decree rendered in the Circuit Court, the case being one of admiralty and of original jurisdiction in the District Court, brought up by an appeal from that Court?

The judiciary act of 1789, 1 Statutes at Large, page 74, sec. 4, among other things provides: "That there shall be held annually in each district of said circuits two courts which shall be called Circuit Courts, and shall consist of any two Justices of the Supreme Court and the District Judge of such district, any two of whom shall constitute a quorum; *Provided* that no District Judge shall give a vote in any cause of appeal or error from his own decision, but may assign the reason for such decision." It is true this law has been repealed so far as it provides that the Circuit Court shall consist of two Justices of the Supreme Court and the District Judge; but the proviso of the law which is a restriction on the District Judge in cases of appeal, is still in force, and by it he is only authorized to state in the Circuit Court the reasons for his decision in the District Court.

Again: By act of April 29, 1802, sec. 5, after providing for the allotments to the circuits, etc., it is further enacted, "in all cases which by appeal or writ of error are or shall be removed from a District to a Circuit Court,

judgment shall be rendered in conformity to the opinion of the Judge of the Supreme Court presiding in such Circuit Court." From this it clearly appears the Judge of the District Court can in no way take any part in the proceedings in the Circuit Court on appeals or writ of error.

Again: By act of March 2, 1867, sec. 2, it is provided, "when an appeal has been taken or may be taken from any final judgment, decree or order of the District Court of the United States for any District to a Circuit Court, the cause appealed by *consent* of parties may be heard and disposed of by the Circuit Court held by the District Judge, at any time after the appeal, in case of the absence at such time of the Chief Justice of the United States or the Associate Justice allotted to those Circuit Courts for such districts." If heretofore the District Judge could in any manner participate in the proceedings on appeal or writ of error in the Circuit Court, clearly there is no necessity of any such law.

This Court in the case of the United States vs. Lancaster, 5 Wheaton, 443, declared, "that it had no jurisdiction of the cause (brought to this Court on a certificate of diversion of opinion) as the District Judge could not sit in the Circuit Court on a writ of error from his own decision, and consequently there could be no diversion of opinion to be certified to this Court.

The very fact of the Circuit Court being the appellate tribunal precludes the idea of the Judge of the District Court in any way participating in a case of appeal or writ of error in the Circuit Court.

The act of April 10th, 1869, has no relation to the Circuit Courts, except as courts of original jurisdiction.

II. The claims of the appellants are all separate and

distinct, each party or firm holding their own notes, which amount in the aggregate to $13,613.53, and are all asserted in our proceeding against the fund in the registry. ($4,337.51,) each of the appellants claiming a pro rata out of said fund. The claim of but one of the appellants, E. W. Rood & Son, amounting to $4,835.47 (exclusive of interest) exceeds the appealable amount, and as that firm only seeks to be paid a pro rata with the other appellants, out of the fund in the registry as aforesaid, the amount in dispute as far as E. W. Rood & Son is concerned, is below the appealable amount, being 1,499.99

See Spear vs. Place, 11 Howard, 522; Rech vs. Lambert, 12 Howard, 347. The last case was a suit in *personam* for the whole amount of the claim. The one at bar is in *rem*, claiming a pro rata of a surplus in the registry.

III. Was the appeal taken in time to operate as a supersedeas?

Which of the two decrees rendered herein was the final decree, that of the 3d June or the 6th June? The one that was rendered and signed on the 3d June, is certainly final as to the mortgage creditors, who are the appellants. It leaves nothing farther to be done by the court as far as they are concerned, there not being sufficient funds to pay the mariners, material-men and furnishers of supplies, whose claims are recognized as privileges superior to those of the mortgage creditors, and to be paid in preference to them. The reference to the Commissioner to make a tableau of distribution in accordance with this decree could in no way concern the mortgage creditors, whose right to priority of payment was already disposed of when the reference was made. It left nothing to be litigated between them and the other parties.

and disposed of their right to priority of payment, and consequently to their entire claim, as there was not sufficient to pay the creditors whose claims were superior in rank. Withenbury vs. U. S., 5 W. 819; Thompson vs. Dean, 7 W. 342; 6 H. 204.

The decree of the 3d June being the final decree, was the appeal taken in time?

Under the act of 1789, the writ of error was a supersedeas and stay of execution, in cases where it was served by a copy being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after passing the decree complained of. By act of 3d March, 1803, when the matter in dispute, exclusive of cost, exceeds the sum of $2000—in cases of equity admiralty—and maritime jurisdiction, an appeal was allowed to the Supreme Court of the United States, and these appeals, by this act, are made subject to the same rules, regulations and restrictions as are prescribed in law cases in writs of error.

We are aware this Court has decided in the case of the Raildroad Co. vs. Bradleys, 7 W. 577, it is not necessary that the record should show an order allowing an appeal, but that when an appeal was prayed, and an appeal bond filed and approved by the Judge, it would be inferred an appeal was actually allowed. But in the present case the petition for an appeal and the order thereon show when the appeal was applied for and when it was allowed, to-wit: on the 15th of June, 1872. The final decision as to the appellants, was rendered on the 3d June, and but one Sunday intervened between that day and the 15th June. Hence the appeal was not taken within the ten days after the rendition of the decree, and the appeal in

so far as the same is a supersedeas, must be dismissed unless the law has been changed by the act of June 1, 1872. The eleventh section of this act declares that a party desiring to have the judgment reviewed on a writ of error or appeal, with a stay of proceedings, "may give *the security* required by law therefor within sixty days after the rendition of such judgment or decree." This section provides only for the time in which the security must be given to obtain a stay of proceedings. The time within which a writ of error must be served by a copy being lodged in the clerk's office, or on an appeal applied for, is not changed.

For the foregoing reasons it is respectfully asked that the said appeal be dismissed.

Respectfully submitted,

RICHARD DEGRAY,

*Proctor for Appellees.*

# Supreme Court of the United States.

CATHERINE A. RODD, ADMINISTRATRIX, ET AL., APPELLANTS,
*vs.*
HENRY G. HEARTT, D. C. McCANN ET AL., APPELLEES.

*No.* 33.

*Appellees' brief and points on the re-argument of this case in favor of the existence of a maritime lien for supplies furnished to a vessel at her home port. Submitted by leave of the Court.*

The appellants are mortgagees, in a mortgage given by the owners of the steamboat Lotawanna; the appellees are the material men who furnished the steamer with supplies, at the city of New Orleans, La., the home port of that vessel. On the 10th of June, 1871, this steamer was libelled by mariners, sold, and the proceeds turned into the registry of the court. The appellants and appellees are intervenors; the first by reason of their mortgage, and the latter by reason of their asserted claim to a maritime lien against the steamboat, and to priority of payment. The appellants and mortgagees deny the maritime lien and the right to the priority of payment, and insist that the costs and the decrees in favor of the mariners having been paid, they are entitled to receive the balance in the registry of the court; there not being sufficient left to satisfy the mortgage and the claims of the material men.

The lower court decided in favor of the appellees on the issue raised, and the appellants have appealed to this court from that decision, and the issues presented are, (1) is the chattel mortgage of appellants authorized by the laws of Louisiana ? (2) have the appellees a maritime lien ?

1. The learned counsel who immediately represented the appellants in the argument of this cause, before this court, stated that the point in counsel's brief for the appellees filed by Mr. Grow, (the second division,) "that the law of Louisiana allows and recognizes no chattel mortgages on personal property or ships, or other vessels, as between her citizens," was an incorrect statement of the law; and he read in support of his assertion, the following article of the Revised Civil Code of Louisiana, of 1870, to wit: Art. 3289, which reads as follows.—"The following objects alone, are susceptible of mortgage :

1. * * * * * * *
2. * * * * * * *
3. Ships and other vessels."

Now this, as it stands, leaves counsel before the court as misrepresenting the law of Louisiana; the least that could be said, he had been mistaken.

The learned counsel who gravely makes this point, omits reading article 3305 of the Revised Civil Code of 1870; the same code, which reads as follows: "Conventional mortgages can only be contracted by an act passed in presence of a notary and two witnesses, or by an act under private signature. No proof can be admitted of a verbal mortgage. *Hypothecations of ships and other vessels are made according to the laws* and *usages of commerce.*" These articles stand now just as they did before the revision of 1870, and are the literal texts of the articles passed upon by these *old decisions cited* by the *counsel filing that brief.* That there may be no dispute about it, the Court is respectfully referred to these articles in the old code under the numbers corresponding to the present numbers of the "Revised Code," 3256 Old Civil Code—

3289 Revised Code; 3272 Old Civil Code—3305 "Revised Code." It is simply this: the Legislature *re-enacted the old articles* under new numbers.

It will be a novel feature in our jurisprudence, when an old law has been re-enacted without the change of a word in the text, to hold that all the adjudications of the courts in interpreting it falls to the ground, and shall no longer be looked upon as the expositions of the meaning of the *re-enacted* law.

The following is what the Courts of Louisiana have said about the two articles referred to, when they stood in the old code, and read just as they do now. They are given for what they are worth:

Ships and vessels are classed by article 3256, Civil Code, (3289 Revised,) among the objects susceptible of mortgage, but this is modified by article 3272, (3305 Revised,) which declares that hypothecations of ships and other vessels are made according to the laws and usages of commerce.

Wickham vs. Leviston, *et als.*, 11 La. An. 702.

The provision in the Louisiana Code, that "ships and other vessels" are susceptible of being mortgaged, is restricted to hypothecations, made according to the laws and usages of commerce. In whatever cases those usages and laws would recognize the validity of a hypothecation of a vessel, our code also recognizes it, *and in none other.*

Malcolm *et al. vs.* Schooner Henrietta *et als.*, 7 La., R. 488.

Loze *vs.* Demity *et als.*, R. 485.

Hill *et als. vs.* The Phœnix Tow Boat Company, 2 Rob., 35.

Hill *vs.* De Lizardi *et als.*, 2 Rob., 89.

Succession of Broderick, 12 An., 521.

Grant *vs.* Fial *et al.*, 17 La., 158.

This will dispose of the legality of the appellant's mortgage.

2. Since the appellees claim a maritime lien against the steamer Lotawanna, on account of the supplies furnished to her, we have presented in this case the question,

whether this court will recognize this claim, or determine to adhere to the decision in the case of "The General Smith," 4 Wheat., 443, (1849.) This cause was argued last term, and the correctness of the principle decided by that case, having been so often called in question, and there not being a full bench when it was heard, it was reassigned for reargument on the second Monday of this term.

The only reason ever assigned for the decision in the case of the General Smith was, that it was in conformity to the English admiralty jurisdiction, which the American colonists brought over with them to this country; that the English admiralty refused to recognize or to enforce a maritime lien for supplies either to a domestic or foreign vessel; that the Constitution of the United States, when it says, that "the judicial power shall extend to *all cases* of *admiralty* and *maritime jurisdiction*," *meant* simply what the Common Law Courts of England *meant* by admiralty and maritime jurisdiction. If this be correct, then the decision of the General Smith is partly wrong, where it says, that in the case of a foreign vessel, the Court would enforce the lien. Under the jurisdiction imposed upon the Courts of Admiralty in England, by the courts of common law, this could not be done. It this country adopted the admiralty jurisdiction of the English Courts of Admiralty, as it existed at the beginning of this century, then they adopted the whole of it, unless some act of Congress can be found qualifying its application to the Admiralty Courts of the United States. The clause in the Constitution, "to *all* cases of admiralty and maritime jurisdiction," either means what the English courts interpret it to mean, or it has a meaning independent of any such ruling. If the decisions of the English judges are to be the rules for the interpretation of our Constitution or the "judiciary act," we cannot accept a portion and reject a portion. Hence, any departure which this court has made, contrary to the English doctrine, has been incorrect and should be corrected. But appellees contend

that this country never adopted the admiralty or maritime jurisdiction of England, as it existed fifty years ago; the clause in the Constitution, "to *all cases* of *admiralty and maritime jurisdiction*," adopts the maritime code as its rule of interpretation; or if not that, then the admiralty and maritime jurisdiction as it existed in the Colonies at the breaking out of the "War of the American Revolution." They contend that the Admiralty Courts of England, up to that period, recognized and enforced the maritime code in its most liberal expression, and that the English courts did, *especially* so, at the time the Colonies were settled, and for over a century after the commencement of their colonial existence, and it was this kind of admiralty and maritime jurisdiction first introduced in this country. They believe that it was the intention of the framers of the Constitution of the United States, that we should adopt the maritime code, as known to continental Europe; that by the maritime law of England, as interpreted by Mansfield, at the time of the Revolution, by the maritime code of Europe, and by the admiralty and maritime law as administered by the Colonies up to the adoption of the Constitution, the material man had a maritime lien on the vessel to which he furnished supplies on credit, which he had a right to enforce in the Vice Admiralty Courts of the Colonies, and in the courts of the Colonies from the "Declaration of Independence" to the time of the adoption of the federal constitution. Inasmuch as the appellees desire to discuss the jurisdiction of the courts of admiralty, or the scope of the general maritime law, no further than it relates to the material man, they will (1) take up the general maritime code, and endeavor to show by its provisions that the material man who furnishes supplies to a vessel on credit, no matter whether it be to a foreign or a domestic vessel, at her home port, he had a maritime lien against her, recognizable and enforceable in the courts of admiralty; and (2) that the maritime code of Europe was nearly, if not quite, the rule of admiralty and maritime jurisdiction in England from her earliest history until

after the middle of the 17th century. Indeed, the maritime law had an existence in England before the common law; and (3) that the American colonies brought with them to this country the ancient maritime jurisdiction of England, and adopted it in its fullest extent; (4) that after the Declaration of Independence and the adoption of the Articles of the Confederation, each Colony regulated its own admiralty jurisdiction, and that there was no uniformity among them in the enforcement, or in the colonial enactments for the regulation of that jurisdiction; and (5) that the United States either adopted the jurisdiction of the colonial vice admiralty courts as it existed before the confederation, or the declaration of the constitution, "*shall extend* * * * to *all cases* of *admiralty and maritime jurisdiction*," *refers* to the *maritime code* for the *proper interpretation* of *that authoritative announcement.*

I.

1. A maritime contract is one which relates to the business of navigation upon the sea or to the business pertaining to commerce or navigation to be transacted or done upon the sea or in sea-ports, and over which the Courts of Admiralty have jurisdiction concurrent with the Courts of Common Law.

2. Such contracts, according to civilians and jurists, include, among others, charter-parties, bills of lading, and other contracts of affreightment, marine hypothecations, contracts for maritime service in building, repairing, supplying, and navigating ships or vessels; contracts respecting averages, contributions and jettisons. *See* 2 *Gall, C. C.* 398, *etc.*, in which Judge Story gave a very elaborate and learned opinion on the subject.

*Parsons' Maritime Law*, 2 *Bouvier's Law Dictionary*, 104.

3. By the general maritime law of Europe, any person who furnishes material or labor for the repair or equipment of a ship, or supplies her with things necessary for her employment—as provisions for the crew—acquires by

this alone, without any express stipulation for that purpose, a tacit hypothecation of the ship itself for his security.

*Davis vs. Child et al.*, 2 *Ware*, 81.

Whether the rules of the maritime law on this subject were derived from the Roman law, or what is more probable, had their origin in the customs and usages of maritime commerce in the middle ages, there is no doubt that a person who lends money for the purpose of repairing a vessel, or furnishing her with supplies, and which is actually employed for that purpose, is entitled to the same privilege against the ship as one who actually furnishes the supplies, or performs the labor.

*Ibid*, 83.

4. Maritime law imports hypothecation.

*The Harrisons*, 1 *Sawyer*, 362 (*note.*)

*Young Mechanic*, 2 *Cureis*, *R.* 104.

See, also, authorities cited in appellant's first brief filed by Mr. Day in this case, page 5.

5. By the general maritime law every contract with the master of a ship implies a hypothecation.

*Roccus Maritime Law*, *page* 31 (*note.*)

6. TITLE II, ART. 1. The judges of the Admiralty shall take cognizance preferably to all others, and between all persons of whatever quality or condition, even though privileged, French and strangers, as well in demanding as defending, of all that concerns the construction, tackle and furniture, arming, victualing and equipping, sale and adjudicating of ships.

ART. II. We declare them competent judges in all actions proceeding from charter-parties, freighting, bills of lading, freight, engagement and wages of seamen, and victuals furnished to them by order of the master, during the equipment of ships; together with policies of insurance, obligations of bottomry, and for the return of voyage:

and generally, of all contracts concerning the commerce of the sea, notwithstanding all submissions and privileges to the contrary.

*Ordnance of Louis XIV. Sea Laws, pages 27–97—not Justices Dominion of the Seas.*

7. A person lending money to equip a ship, or load the goods, or for the payment of these on the merchandise shipped, or for the storage of the goods, or for taking care of the cattle, or for seed sown in a field, or for labor done or expense incurred in the care of an estate, for an advocate, solicitor, agent, clerk, blacksmith, shoemaker and the like, is in many instances preferred to other creditors.

*Roccus Maritime Law.* Note xciii.
" " " " xc.
" " " " xci.
" " " " xcii.

See translation of *De Exercitoria Actione* 14, Book of Digest, Title 1, 2 Vol. Hall's American Law Journal, p. 462.

8. By the civil law, those who built, repaired or supplied a ship, had a privilege or lien upon the ship herself for the amount of the debt thus contracted in creating her, or keeping up her existence and usefulness. The same principle is incorporated into all the codes of maritime law, and is a well-settled rule of the general maritime law; and, as such, was acted upon by the English admiralty for centuries, till it was overthrown in the time of Charles II.

Benedict's Admiralty, § 271 and authorities there cited.

9. The general maritime law giving this lien or claim upon the ship for supplies, makes no distinction between the cases of domestic and of foreign ships, or between supplies in the home port and abroad.

2 Bell Comm. 525, 226, 527.

Pothier Pandects, Lib. 42, Tit. 5, §33.

Id. Lib. 20, 20 Tit., 4, per tot.
Roccus de Nav. et Naul. n. 91, 92, 04.
J. Brown's Civil and Admiralty Law, 142.
The Nestor, 1Sumner, 79, etc.
Parsons Ship and Adm., 322.

## II.

### THE ANCIENT MARITIME JURISDICTION OF ENGLAND.

1. It is believed, and pretty well sustained by evidence, that the maritime code proper had an existence in England prior to the introduction and adoption of the *laws* of *Oleron*; and that it was recognized and enforced by the king's courts before the common law was chrystallized into the system of that kingdom.

*Wynn's Life* of Leoline Jenkins, vol. 1—142–423.

2. The laws of Oleron were introduced into England by Rich. I, A. D. 1226, and were, by the authority of the kings, adopted as the rules of the courts of admiralty in England.

Edward's Maritime Jurisdiction, p. 14–15.
Lex Mercatoria Malyns—344.
Benedict's Adm., § 53–54—51–52.

3. In the second year of his reign, Edward I. published what are known as the Ordinances of Hastings, the first item of which reads as follows: "It is agreed at Hastings, by King Edward the First and his lords, that as many lords had divers franchises to hold pleas in parts, their seneschals and bailiffs shall hold *no plea if it touch merchant or mariner*, as well by deeds as by obligation or other deeds, whether the same amount to twenty or forty shillings, and if any one shall be indicted for doing the contrary, and shall be convicted, he shall have the same judgment as below provided."

"*Item.—Every contract made between merchants or merchant and mariner, beyond the sea, or within the flood-mark, shall be tried before the Admiral, and not elsewhere, by the ordinance of the said King Edward and his lords.*"

4. These ordinances were in use for a long time, and the maritime business of England was governed by them, and all maritime causes were tried and adjudged in accordance with their provisions. It seems that these cases were entered in the Black Book of Admiralty, in which reference is often made to the laws of Oleron and the ordinances of Edward I. Prynne also quotes from this book the following inquisition:

"*Black Book of the Admiralty.*"

5. *Item.*—Let inquisition be made of all those who implead *any* merchants, mariners, or other men, at common law, of anything pertaining to the ancient marine law, and if any one is indicted and convicted he shall pay a fine to the king for his improper suit and vexation, and *shall besides withdraw his suit from the common law and bring it before the Admiral's Court*, if he will further prosecute it.

* * * *Et nota.*—That all contracts began and made inter-merchant and merchant, beyond the sea, or within the flow and reflow, commonly called the flood-mark, shall *be tried and determined before the Admiral, and not elsewhere*, by the aforesaid ordinance.

Benedict's Admiralty, § 55–56–58–59.

6. And in the forty-ninth year of Edward III., A. D. 1376, the inquisition of Quinborough occurred. Among the articles adopted by that inquisition was the following:

III.—OFFENCES AGAINST THE ADMIRAL, THE NAVY, AND THE DISCIPLINE OF THE SEA.

(1.) Of judges entertaining causes belonging to the Admiral, and such as in admiralty causes sue in the courts of common law, and of such as hinder the execution of the Admiral's process.

Benedict's Adm. § 63.

7. The extensive jurisdiction of the Admiralty brought forth, in 1389, the statute of 13 Richard II., wherein "it is accorded and assented, that the Admirals and their deputies shall not meddle from henceforth with anything done within the realm, but only of a thing done upon the

sea, as it hath been used in the time of the noble Prince, King Edward, Grand-Father of our Lord the King, that now is."

8. And then, in 1391, followed the Statute of 15 Richard II., providing that the Admiral shall not have cognizance, power nor jurisdiction of all manner of contracts, pleas, and quarrels, and all other things rising within the bodies of the counties, as well by land as by water, and that such things shall be tried, determined, discussed and remedied by the laws of the land, &c. A dispute arose between the Judges of the Admiralty and the Common Law Courts, as to the meaning of the phrase, "*within the bodies of the counties, as well by land as by water.*" It was contended that this statute repealed 13 Richard II., so far as that act prescribed the usage of the time of Edward I., as the rule of Admiralty jurisdiction. The judges of the Admiralty Court held that it did not. Benedict's Adm. §71.

9. This statute, however, though plainly not intended to limit the ancient jurisdiction of the Admiralty, but simply to secure the King and the Lords their perquisites, was, nevertheless, the means of making the Admiralty subject to the same encroachments and usurpation which the statute was intended to prevent, and in the year 1400 the Statutes of 2 Henry IV. passed. It was as follows:

*A. D.* 1400—2 *Henry IV., Cap.* 11.

"Item.—Whereas in the statute made at Westminster in the 13th year of the Second King Richard, amongst other things it is contained that the admirals and their deputies shall not intermeddle from thenceforth, of anything done upon the sea, according as it hath been duly used in the time of the noble King Edward, grandfather to the said King Richard, our Lord, the king willeth and grauteth that the said statute be firmly holden and kept and put into execution."

10. This act was evidently intended to correct the narrow construction placed upon the act of 15 Richard II, by the common law court, and clearly brings back the jurisdiction of the Admiralty, and leaves it where the act of 13 Richard II., placed it.

Benedict's Adm., 72.

11. However the king may have been led to believe that the passage of this last act would allay the jealousy and jurisdictional rapacity of the common law courts, it evidently failed to produce that effect. For a century and three-quarters a hostile rivalry was kept up between the judges of the two jurisdictions, with varying success, until 1575, when hostilities and rivalries were put at rest by an agreement, made and entered into between the judges of the Admiralty and the Lord Chief Justice and his associates of Her Majesty, Queen Elizabeth's Bench, May 7, 1575. One of the articles of that agreement reads as follows: "Request:" "That the judge of the Admiralty, according to such ancient order as hath been taken, 2 Ed. I., by the king and his counsel, and *according to the letters-patents* of the Lord Admiral for the time being, and allowed of by other kings of this land ever since, and by customs, time out of memory of man, may have and, enjoy the cognition of all contracts and other things arising, as well beyond as upon the sea, without any let or prohibition."

"AGREEMENT.

"This is agreed upon by the said Lord Chief Justice and his colleagues."

Still, hostilities did not cease; the conflict between the two courts continued up to 1611, when the King was appealed to that he might arrest the rapacity of the King's bench. But he did no more than to direct Mr. Dunn, the judge of the Admiralty, to prepare the list of grievances, known as *Articuli Admiralitis*. Nothing, however, it seems, came of this. The common law courts continued their encroachments and manifestations of hostility, until they met

further check by the articles drawn up and signed at Whitehall, February 18, 1632, by all the twelve judges of the common law courts, and by the "grand lawyer, Mr. William Noye, Attorney General, a great professor and pillar of the common law," and by the judge of the Admiralty entered in the council table register of causes, and the original, by his Majesty's command, kept in the council chest."

Benedict's Amd., § 74 to 98.

12. The third article of that jurisdictional settlement reads as follows: "If suit shall be in the Court of Admiralty for building, amending, saving,or necessary victualing of a ship, against the *ship itself*, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted though this be done in the realm."

Benedict's Adm., § 94.

13. On the 12th of April, 1648, under the Protectorate, Parliament passed an act, which is entitled, "*The jurisdiction of the Court of Admiralty settled.*" This act ordained, "*that the Court* of *Admiralty shall have cognizance and jurisdiction against* the *ship or vessel, with the tackle, apparel and furniture thereof, in all cases which concern the repairing, victualing and furnishing provisions for the setting of such ships or vessels to sea.*" * * * *

Benedict's Adm., § 100, &c.

14. This ordinance ceased to be in force after the Restoration, 1660. We have brought down the maritime law and admiralty jurisdiction of England to the accession of Charles II. to the throne of Great Britain, and there cannot be a particle of doubt, up to this time, but that the material man has a right of action against all ships to which he may furnish necessary supplies on credit, whether the vessel be foreign or domestic.

We, however, soon find the common law courts encroaching upon the well defined jurisdiction of the admiralty, seeking to deprive them of their conceded jurisdiction. It is from the decisions of the courts from this

time forward, that we gather the history and the result of this contest. And it is known that the Court of Admiralty eventually succumbed to the unscrupulous exercise of the power of the King's Bench to issue prohibitions, but as there might be some dispute as to the time *when* the Court of Admiralty ceased to assert and enforce its ancient jurisdiction, the appellees will cite authorities from the decisions of the King's Bench, to show that what was known as the ancient admiralty jurisdiction was exercised by the Court of Admiralty up to about the middle of the last half of the last century. It would, however, be well to bear in mind, that it is clearly shown by Zouch, Godolphin, and Sir Leoline Jenkins, that the ancient admiralty was in full force, interrupted by an occasional prohibition, until about 1686.

16. These are two decisions which are often referred to as being the last cases decisive of the collision between the contestants, but it will appear that the conflict did not end until a much later period: that it did not end in the reign of Charles II. The cases referred to are *Hoar* v. *Clement*,2 Shower's Reports,342,decided in the latter part of Charles II's reign, and *Justin* v. *Ballam*, decided at the beginning of the reign of Queen Anne, (1702.) 2 Ld. Raymond's Reports, 805. Queen Anne ascended the throne 1702 and reigned thirteen years.

17. The latest cases to be found sustaining the admiralty jurisdiction over the claims of material men, are where Lord Mansfield decided that "The material man has for supplies as security the specific ship."

*Rich* v. *Coe*, Cowper's Reports, 639, (1777,) and *Farmer* v. *Davis*, 1 Durnford and East's Reports, 109 (A.D. 1789.)

*The Zodiac*, 1 Hagg., 321 (A. D. 1825.)

*The Neptune*, 3 Hagg., 135.

Edwards' Maritime Juris., 94.

18. MATERIAL MEN.—English Courts of Admiralty took jurisdiction of causes of material men up to and after the beginning of the last century.

2 Brown's Civil and Admiralty Law, 75, &c.

19. Material men were paid out of the proceeds in the register of the court from 1761 to 1834.

*Zouch, Assertion III.*

20. That in all places where judges have been appointed for sea business, as also in England, certain causes, viz: such as have relation to navigation and negotiations by sea, have been held proper for their connusance.

1 Lex Mercartoria Malyns, 393.

*Zouch, Assertion V.*

21. That the Admiral of England may hold connusance of contracts and writings made at land touching business of navigation and trade at sea.

1 Lex Mercartoria Malyns, 402, or 102 collection of sea laws in the back part of the volume.

This treatise was published by Dr. Zouch in 1663.

22. Also, the large and comprehensive admiralty jurisdiction of England is fully set forth in a volume entitled "Justice's Dominion of the Sea," published London, 1705, being a different treatise from the "Sea Laws" on pages 207, 208, 209, etc., and 227.

23. Sir Leoline Jenkins, the most eminent civil law lawyer and admiralty judge of his day, was appointed judge of the High Court of Admiralty of England on the accession of Charles II. to the throne. He died about 1685. But while he occupied that bench his opinions, reports, and writings not only attest the full admiralty jurisdiction of his country, but to his character as one of the most distinguished jurists of that day. At one time he delivered an argument on the admiralty jurisdiction of the Admiralty Courts of England, of which foreign jurists have spoken in the highest terms. Indeed, he was looked upon as the most learned and upright man in Europe.

Wynn's Life of Jenkins, 1, xiii.

He has treated fully of the admiralty of England, and accords to it the fullest jurisdiction of the maritime code.

Ibid, 1—lxxx.

24. In his argument for admiralty jurisdiction he mentions the case of two material men who had furnished supplies to a domestic vessel which, in the consideration of the jurisdiction of the Admiralty Court, was called in question. The jurisdiction was maintained. In the last case mentioned a writ of prohibition had been issued, but upon an examination into the question of the jurisdiction of the court, consultation was granted.

Ibid, 1—lxxx.

25. * * * I must, therefore, by reason of the daily clamors I have from material men, most humbly take leave to open their cases as it stands in the Admiralty, to your Majesty's most gracious consideration. Those are commonly called material men whose trade it is to build, repair, or equip ships, or to furnish them with tackle and provision (necessary in any kind.) Those men, when they have furnished any victuals or materials upon the credit of a ship, are certain losers if they be prohibited from taking their remedy against such ships by arresting and proceeding to gain a possession ot the ship itself, till the debt be satisfied according to the ancient course of admiralty. If they be put to their personal action against the master only who employed them at work, or took up their goods, they find him most commonly not worth of his own the fortieth part of what he may, and in some cases must, take upon the credit of his ship.

Wynn's Life of Sir Leoline Jenkins, Vol. 2, p. 746–7.

26. The admiralty jurisdiction of England is treated succinctly and ably by Mr. Edwards in his treatise on the Court of Admiralty, pp. 25, 26, 62, 63, 93, 94, 100, 107.

All maritime affairs are regulated chiefly by the civil law, Rhodian law, the laws of Oleron, or by particular and municipal laws and constitutions appropriated to certain cities, towns, and countries bordering on the sea.

2 Bacon's Abridgment, 505.

### American view of the Admiralty Jurisdiction of England.

27. It has been repeatedly asserted by the Admiralty Courts of this country, that the ancient maritime and admiralty jurisdiction of England was exercised conformably to the rules of the maritime code.

2 *Ware*, 141.
*DeLovio vs. Boit*, 2 *Gall*, 398, 469.
*The Huntress*, 2 *Gall*, 107.
3 *Wheat.*, 359.
3 *Wheat.*, 372.
*Warring vs. Clark*, 5 *Wheat.*, 473, 457.
*The Nestor*, 1 *Sumner*, 79.
*Benedict's Adm.*, § 271.

28. The wants of commerce in this commercial age have become too imperious to be disregarded; and even in England, in the Statute 3 and 4 Vic., c. 65, a great step has been taken towards restoring to the High Court of Admiralty those cases of admiralty and maritime jurisdictions of which the common law courts had deprived them.

29. "It was deemed expedient to restore the ancient jurisdiction of the court of admiralty."—Dr. Lushington, p. 371. The Ocean, 2 Wm. Rob., 368.

30. Under the 6th section of Statute 3 and 4 Vic., chap. 65, renewing the jurisdiction of the Court of Admiralty, the court will assume jurisdiction of a suit for supplies furnished previously to the passage of the act.

*The Alexander*, 1 *Wm. Robinson*, *Rept.*, 228.

## III.

### The Admiralty and Maritime Jurisdiction of the American Colonies.

*The Settlement of the American Colonies.*

The Colonies were respectively settled at the dates hereinafter set forth:

| | |
|---|---|
| Maine, | 1638. |
| New Hampshire, | 1623. |
| Massachusetts, | 1620. |
| Rhode Island, | 1636. |
| Connecticut, | 1633. |
| New York, (an English colony,) | 1664. |
| New Jersey, | 1622. |
| Delaware, | 1627. |
| Maryland, | 1634. |
| Pennsylvania, | 1664. |
| Virginia, | 1626. |
| North Carolina, | 1660. |
| South Carolina, | 1660. |
| Georgia, | 1732. |

From the foregoing it will be seen that all of the Colonies with the exception of Georgia were settled a long time prior to the decisions in the cases of *Justin* v. *Ballam* and *Hoare* v. *Clement*, and for nearly a century and a half when Lord Mansfield rendered the decisions in the causes entitled *Rich* v. *Coe* and *Farmer* v. *Davis*, the one in 1777 and the other in 1786. It is true that the correctness of these decisions has been doubted, but be that as it may, it nevertheless discloses the fact at least, that this disputed admiralty jurisdiction was "*divisium imperium.*" And it also appears that these settlements and the formation of the Colonial Governments were made during a period of history of the parent country, when the almost unlimited jurisdiction of the Court of Admiralty was conceded and guaranteed by the solemn convocation of the judges, and an act of Parliament passed during the existence of the Protectorate.

But the better test of this jurisdiction is, perhaps, to be drawn from the commissions issued to the vice admirals of the Colonies, authorizing the creation of the Courts of Vice Admiralty, and enumerating the causes of which they could take cognizance. There are ten of them that have been examined.

The earliest commission issued of this character affecting the American Colonies which I have been able to find, is the one issued to Governor Hunter as vice admiral of the Province of New York, (1668,) embracing within its terms as well the other Colonies. (*Colonial History of New York, vol. 5, p. 424.*) And the last one was issued to Judge Stokes, as vice admiral of Georgia. This last commission was issued just before the commencement of the Revolutionary war.

*Stokes' History of the American Colonies, ch. 4, p. 166.*

All of these commissions appear to be uniform, and contain the following paragraph relative to the jurisdiction of the Vice Admiralty Courts: "To take cognizance of and proceed in all civil and maritime causes, and in complaints, contracts, offences or suspected offences, crimes, pleas, debts, exchanges, accounts, charter parties, agreements, suits, trespasses, injuries, extortions and demands, and business civil and maritime whatsoever, commenced or to be commenced between merchants, or between owners and proprietors of ships and other vessels whatsoever, employed or used within the maritime jurisdiction of our vice admiralty of our said Provinces and Colonies, and the territories depending thereon, or between any other persons whomsoever, had made, begun or contracted for any matter, thing, cause or business whatsoever, done or to be done within our maritime jurisdiction aforesaid, together with all and singular their incidents, emergencies, dependencies, annexed or connexed causes whatsoever or howsoever, and such causes, complaints, contracts and other the premises above said, or any of them, which may happen to arise, be contracted, had or done, to hear and determine according to the rights, statutes, laws, ordinances and customs anciently observed."

2. This jurisdiction in both cases, speaking of admiralty and prize, is exercised in the same person. He is appointed the judge of the Admiralty by a commission un-

der the Great Seal, which enumerates particularly as well as generally every object of his jurisdiction, but makes no mention of prize. To constitute that requires a special commission.

2. Bacon's Abridgement, p. 495.

3. So far as the commission of the Vice Admiral defines the jurisdiction of that Court, it would appear that the Colonial Vice Admiralty had as full and ample jurisdiction as were ever conferred upon any Admiralty Court by the general maritime code.

That this was the view I propose to cite the following authorities:

De Lovio *vs.* Boit, 2 Gall, 470–471.

"And most cordially do I subscribe, says Mr. Justice Story, to the opinion of the learned Mr. Justice Winchester,(The Sandwich, 1 Peters'Adm., R.223) in the case already cited, "that the Statutes of Richard II. have received in England a construction which must, at all times, prohibit their extension to this country," and "that no principle can be extracted from the adjudged cases in *England* which will explain or support the Admiralty jurisdiction, independent of the statutes or the works of jurists who have written on the general subject."

De Luvio *vs.* Boit, 2 Gall, 473.

"If we pass from the etymology and the use of terms (i. e. "Admiralty jurisdiction") in foreign countries, the only exposition of them that seems to present themselves are, that they refer to the jurisdiction of the Admiralty, as acknowledged in England at the American Revolution; or 2, at the emigration of our ancestors; or 3, as acknowledged and exercised in the United States, at the American Revolution; or 4, to the ancient and original jurisdiction inherent in the Admiralty of England by virtue of the general organization."

"As to the first exposition, it is difficult to perceive upon what ground it can be reasonably maintained, for it would enlarge and limit the jurisdiction by the provi-

sions of statutes which have been enacted for the government and regulation of the High Court of Admiralty, and which, *proprio vigore* do not *extend to the Colonies.*" * * * * * *

The second exposition is liable to the same objections; for it is clear that the Statutes of *Richard* do not extend in terms to the Colonies, and it is quite certain that they were not included in any supposed mischiefs, for they had no existence. Besides, it is a very material consideration, that at the emigration of our ancestors the contest between the courts of common law and the admiralty was at its height; and very soon after (in 1632) it was, by the agreement of the twelve judges, decided in favor of the admiralty. And here again it may be asked, whose doctrines are to be adopted, those of the common law or the Admiralty ? "

The third exposition requires an examination of the authority and powers of the Vice Admiralty Courts in the *United States* under the Colonial Government. In some of the States, and probably in all, the Crown established or reserved to itself the right to establish Admiralty Courts; and the nature and extent of their jurisdiction depended upon the commission of the Crown and upon the acts of Parliament conferring additional authorities. The commissions of the Crown gave the courts which were established a most ample jurisdiction of all maritime contracts, and over torts and injuries, as well in ports as upon the high seas. And acts of Parliament enlarged, or rather recognized this jurisdiction by giving and confirming cognizance of all seizures for contravention of the revenue laws. Tested, therefore, by this exposition, the admiralty jurisdiction of the United States would be as large as its most strenuous advocates ever contended for.

Ibid, 469, 470, 471.

The Huntress, 2 Ware, n. 102, 101, 103.

Story on the Constitution, § 1664.

Waring vs. Clarke, 5 Howard, 454.

Opinion by Mr. Justice Wayne.
The Volunteer, 1 Sumner, 557.

The jurisdiction exercised, in fact, probably varied in different colonies, and in the same colony under different judges. That conferred by the commission extends to all that was ever claimed by the admiralty; and the best evidence of the rightful jurisdiction of the court undoubtedly is the commission of the judge.

The Huntress, 2 Ware, 102, (note.)

4. One extension of the jurisdiction of the courts of the United States exists beyond the limits proposed, just as it existed in the colonies before they became independent States, which has never been a case of admiralty jurisdiction in England. We mean seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea, by vessels of ten or more tons burden, &c. * * * It is well known that the Admiralty Courts of the colonies had jurisdiction of the breaches and violations of the laws of navigation and trade, which the High Court of English Admiralty had not; the conferring this jurisdiction upon the admiralty courts, under the Constitution of the United States, ought to be considered as a contemporaneous exposition of the source of our admiralty jurisdiction, by the fathers of our government.

5. The opinions of Mr. Justice Winchester, in the case of the Sandwich, (1 Pet. Adm., Sec. 224,) and Mr. Justice Story, in De Lovio *vs.* Boit, have been unfavorably criticised by Mr. Justice Johnson, in his dissenting opinion in the case of Ramsay *vs.* Allegre, 12 Wheat., 614.

He emphatically denies the correctness of their conclusions, and asserts that the Admiralty Courts of this country are tied down by the illiberal constructions which common law courts of England placed upon the jurisdiction of the "High Court of Admiralty." It will suffice to say, if that opinion ever was entitled to any weight, that it has been repeatedly overruled, and the views of Mr.

Justice Story, as expressed in the case of De Lovio *vs.* Boit, have been repeatedly re-affirmed.

Waring vs. Clark, 5 Howard, 451.

The Magnolia, 20 Howard, pp. 299–351.

The Genessee Chief, 12 Howard, p. 451.

The China, 7 Wall, p. 69.

United States vs. Bevans, 3 Wheat, 336.

Insurance Company vs. Dunham, 11 Wall, p. 1; Mr. Justice Bradley delivering the opinion of the court.

I might adopt the language of Mr. Wheaton in his argument in the case of the *United States vs. Bevans*, 3 Wheat. 357–8–9, and submit the case. He says: "On this branch of the case it would be useless to do more than refer to the opinion of one of the learned judges of this court," (De Lovio vs. Boit, 2 Gall, 398) " in which *all the learning on the civil and criminal jurisdiction of the admiralty is collected together*, and *concentrated* in a *blaze of luminous reasoning.*"

6. Before closing this branch of this brief, it will be both interesting and instructive to refer the court to two or three citations of authorities as presented in the brief of Mr. Loring, in the argument of the case of the Insurance Company vs. Dunning, 11 Wall, p. 9. I quote from that argument where he says: "But until lately, little was known (speaking of Colonial Vice Admirals commissions) as to what jurisdiction was actually exercised by the judges under these commissions. In the office of the District Court for Massachsetts there was only one imperfect volume of the records of the Vice Admiralty Court of the province. This is not half filled, and contains only a few cases which relate to matters of prize, revenue, and wages. The other volumes were supposed to have been taken to Halifax, at the time of the evacuation of Boston, and to have been lost or destroyed. Lately, two volumes have been found among the papers of a former registrar of the court, and have been deposited in the library of the Boston Athenæum; they are the second and third volumes, beginning in 1718, and extend-

ing to 1733; the first is missing; the one in the clerk's office extends from 1740 to 1744 only; and the rest are also missing.* An examination of these two volumes discloses that the Court exercised jurisdiction of all maritime causes. Besides numerous suits for wages, and liberations, and assaults, they contain records of over fifty cases of libels on maritime contracts. There may be found libels for contribution, both *in rem* and *in personam*; on charter parties, on contracts of affreightments, for freight, for non-delivery or damage to goods; between owners for an account, by masters *in rem* for wages and disbursements; against a mate for non-performance of his contract; for surveys, condemnations and sales; of *material* men, for supplies in home port *in rem*; against a mate for error in making a bill of lading; by the builder of a ship, for its price *in rem*, after it had been delivered; by passengers and various other cases. * * * "There is one case reported in Pennsylvania, Talbert's case, (1 Dallas 95,) which shows that the Court of Admiralty of that province exercised jurisdiction over all admiralty cases." * * * "It will be found on examining the records referred to, that no objection was made to the extensive jurisdiction exercised. It seems to have been considered a matter about which there could be no doubt. In one case only was there a plea to the jurisdiction. A master sued *in rem*, in a home port, for wages and disbursements. Such a plea was interposed and overruled."

7. "Thus it appears that the jurisdiction claimed by Story, J., Ware, J., and others, for the Admiralty Courts of the United States, is not anything new and before unknown, but only that it is not so extensive as that which was actually exercised by the colonial courts."

"If the jurisdiction known to have been exercised by the Admiralty Courts before the Revolution is to be taken as the rule, it must be admitted that every case which

* It is not known that any of the records of the other Vice Admiralty Courts are in existence. They were probably carried off or destroyed at the time of the Revolution.

can properly be defined as maritime, is a proper subject for the jurisdiction of the United States District Court."

* * * * * * * * *

8. "The same conclusion must be drawn from the fact that admiralty jurisdiction was exercised by Vice Admiralty Court of Massachusetts over all maritime contracts and cases. The judge who presided in that court was at the same time the judge of the Vice Admiralty Courts of New York, Pennsylvania, the Jerseys, New Hampshire, Connecticut, Maine and Nova Scotia.*

"And it must have been that he held and exercised the same jurisdiction, when holding court in the other colonies or provinces included in his commission, that he did when sitting in Massachusetts."

9. It may be safely conceded that the jurisdiction of the Courts of Admiralty of the colonies were co-extensive with that granted in the commissions to the Vice Admirals, and also that it has been shown to a reasonable certainty what the jurisdiction of these colonial courts was down to the Revolution; to the time of the Declaration of the Independence of the colonies. What that jurisdiction was, from that period until the adoption of the present Constitution, will be presented in the following division of this brief.

## IV.

### COLONIAL ADMIRALTY JURISDICTION FROM THE REVOLUTION TO THE ADOPTION OF THE FEDERAL CONSTITUTION.

1. At the time of the Revolution each State assumed for itself all the powers of sovereignty, including all judicial powers, in their greatest plentitude, except so far as they were limited by the Articles of Confederation. In some of the States in which an Admiralty Court had previously existed, the court was retained, the judge being appointed

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*Commission of Roger Monpesson, Judge of the Court of Vice Admiralty in Massachusetts Bay, New Hampshire, Connecticut, Rhode Island, the Jerseys, New York and Pennsylvania. Benedict's Admiralty, p. 88, note.

by the newly constituted State, by a simple commission as Judge of the Court of Admiralty. No statute had specified his powers, and his commission was silent on the subject. He was appointed to exercise the same powers as the colonial courts had exercised. Such were Massachusetts and New York. In some of the States, as in New York, the statute of 15 Rich. II. was enacted, and in others it remained unchanged. Thus, in different States, the constitutions of the Admiralty Courts and the limits of the admiralty jurisdiction were widely different. In some of them the court was abolished altogether: and in others new courts were established with powers regulated by statute. *Benedict's Admiralty*, § 166.

2. Pensylvania, September 9, 1778, passed an act establishing and regulating the admiralty and maritime jurisdiction of that State. By that act this court had cognizance of all controversies, suits, and pleas of maritime jurisdiction, not cognizable at common law, &c.

By Section 22, it was enacted that "all and every the proceedings of the Court of Admiralty of this Commonwealth shall be liable to the prohibition of the Supreme Court of Judicature in like manner, and with like effect, as the prohibition of the Court of King's Bench in England in like cases."

Benedict's Adm., § 167.

3. New Jersey, in 1781, enacted a law which provided that the judge of the admiralty should "hold a Court of Admiralty, and therein have cognizance of prizes, captures, &c., and in general, of all controversies, suits and pleas of maritime jurisdiction, and thereupon he shall pass sentence and decree according to the maritime law and the law of nations, &c.

Benedict's Adm., § 169.

4. Maryland, in 1776, passed an act regulating the trial of captures, of seizures, &c.

Benedict's Adm., 169.

5. Virginia, in 1779, passed an act creating an Admiralty Court, and provided that it "shall have jurisdiction of all

maritime causes, except those wherein parties may be accused of capital offences." It was expressly provided that such court was to be "governed in their proceedings and decisions by the regulations of Congress of the United States of America; by the acts of the general assembly; by the *laws of Oleron and the Rhodian and Imperial laws, so far as they have been heretofore observed in the English Courts of Admiralty; and by the law of nature and nations*,"—"a wide and beneficial jurisdiction. No one can fail to observe how distinctly the ancient ordinances and maritime laws, the civil law, and the former practices of the English Admiralty were mentioned at that time." The rulings of the Court of the *King's Bench* is not referred to but once, and that in the State of Pennsylvania.

Benedict's Adm., § 170.

6. During the War of the Revolution, maritime causes, other than prize cases, must necessarily have been very few, since the most of the navigable waters of the Colonies were occupied by the British fleet. And I have found but one case referred to, which arose during the period of the Confederation; that was a case reported in Pennsylvania.

Talbot's case, (1 Dallas, 95,) *Insurance Co. vs. Dunham*, 11 *Wall*, *p.* 11.

V.

7. "The judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time establish." "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction." This clause of the Constitution has, undoubtedly, received a greater amount of consideration, and undergone more frequent interpretations, than any other portion of the Organic Law of the United States, and there was perhaps for a long period of time no clause around which clung a greater amount of uncertainty. *All* cases of admiralty and maritime jurisdiction was for a long while in pursuit of the true rule of its interpretation.

It has been,however,conclusively settled that the construction which the Court of the King Bench of England has placed upon the jurisdiction of the High Court of Admiralty is inapplicable as a guide to our courts in their considerations of this question. Indeed, all of the courts of the United States ignore the common law limitation of the English Admiralty jurisdiction. And it is now pretty well settled by the recent decisions of this Court, that we are to look to the maritime code, or to the Colonial Admiralty jurisdiction, which is equivalent to it, for the true rule of exposition.

The Insurance vs. Dunham, 11 Wall, 1.

The China, 7 Wall, 69.

The Genessee Chief, 12 Howard, 451.

The Magnolia, 20 Howard, 299–341.

Waring vs. Clark. 5 Howard, 451.

Norwich Co. vs. Wright, 116.

5 American Law Review, 1870 and 1871, 582, and authorities there cited.

De Lovio vs. Boit, 2 Gall, 398.

The Huntress, 2 Ware, 102, *et seq.*

8. We have seen that the general maritime law, and the maritime law as enforced in the Courts of the Colonial Admiralty, recognized and enforced a maritime lien in favor of a material man against a vessel for supplies furnished at her home port. That should be the accepted law of the United States; it is the law; it has been denied a forum. And the only obstacle to the full and complete recognition of this principle, is the familiar and often quoted case of the General Smith, 4 Wheat, 438, the solitary and unsupported relic, hardly remnant, of the wreck of the British Admiralty in this country as interpreted by the Court of the King's Bench in England.

It has been, in principle, repeatedly overruled. After reading the opinion of Judge Story, in De Lovio vs. Boit, it is with difficulty that we are brought to believe that he delivered the opinion in *the General Smith.* Yet that

case has been the ruling decision on the question of material men's lien for supplies furnished a vessel at her home port for over a half century, and it has been strictly adhered to. That decision was based on the belief that our Admiralty jurisdiction was subject to the common law limitations of England. That view has been exploded. See the authorities above cited. Then, if we are governed by English Admiralty jurisdiction, as it existed about the time of the Revolution, we shall be compelled to accept the general maritime law, or the Admiralty jurisdiction of the colonies as administered at the time of the Declaration of Independence. *Either* recognize the material man's lien for supplies furnished to a domestic vessel. The decision of the General Smith was clearly wrong.

Notwithstanding this decision has stood so long, the lien of the material man has existed by reason of the general maritime law.

The St. Lawrence, 1 Black, 522.

The Admiralty Court of England recognizes the same principle.

The *Alexander*, 1 Wm. Robinson Reports, 228.

After the jurisdiction of this court was renewed, (6th sec., chap. 65, 3 and 4 Victoria,) it was held that the court would assume jurisdiction of a suit for supplies furnished previously to the passage of the act.

See also the *Maggie Hammond*, 9 Wall, 451 and 452.

9. Domestic material man's lien has the most solid foundation in natural justice.

The *Harrison*, 1 Sawyer, 370.

Benedict's Admiralty, §§ 271 and 272.

## VI.

### The Decision in the case of the General Smith as a Rule of Property.

1. It is urged that the decision in this case has become a rule of property, and that a reversal of it would be de-

structive of property interests. In the case of the *Genessee Chief* above cited, the same question was raised. In the case of the *Thomas Jefferson*, 10 Wheat., 428, it was held that tide water was the limit of admiralty jurisdiction. The act of 1845 extended this jurisdiction over the inland waters of the United States to the class of cases enumerated in it. The court held in the first case that the admiralty jurisdiction was not confined to the tide waters, nor did it obtain its jurisdiction from that act, but that it was co-extensive with the inland navigable waters in a commerce carried on between States. This decision extended the jurisdiction of the Courts of Admiralty to an additional class of cases—those persons having mortgages against vessels engaged in inland commerce, and those having liens which the act of 1845 purported to create—and provided that the Courts of Admiralty should enforce against the vessel subject to it, interposed the objection that their rights of property would be ruined. The court said, no; that it was a question of jurisdiction; that it did not violate the maxim, "*Stare decisis.*"

2. It was held for a long time that the Courts of Admiralty had no jurisdiction of matters arising out of the internal commerce of a State. But in the case of *The Commerce*, 1 Black, 574,1861, this doctrine was overruled; and in the case of the Belfast, 1868, 7 Wall, 624, the same principle was reaffirmed. What was the attitude of the mortgagee, holding mortgage against a vessel? The question rule of property comes up again, but the court would say, no; it is a question of jurisdiction.

3. Now comes the case of the Lattawanna. The appellees ask that this court shall overturn the decision in the case of the General Smith, and enforce their lien as material men against that steamboat. The appellants say, no; the court cannot do that; it is a question of property. Appellees say, that it is no more so than the instance just cited; that it is purely a question of jurisdiction. The property remains the same; the new claimants have pro-

bably enhanced the value of the vessel, through the supplies which they have furnished, and the vessel should be worth enough to satisfy all parties.

4. It is said again, on the other hand, that a reversal of the General Smith will destroy the value of vessel property. This is a conjecture, and besides it is not a good one. Commercial men do not view it that way. Of what value is a vessel in a foreign port and in need, without credit? She could not complete her voyage—she would be worthless. Her ability under the maritime law to obtain credit gives her value, and enables her to fulfill the objects of her creation. The larger her credit, the more successful will she be in the hands of prudent men. The reversal of the case of the General Smith will enlarge the credit of vessels, and cause them to be more eagerly sought after by men of moderate means. The result in an affirmance of the judgment will be the tendency to increase the value of and multiply vessels to meet the demands of commerce.

Justice Benedict's unpublished opinion in Morris vs. the Crescent City.

5. The reviewal and overruling of the General Smith will be no greater tribute to the principles of the general maritime code than was paid to it in a case stated to one of the Roman Emperors for his opinion. Dig., Lib. 14, Tit. 2, §9, when he says: "I, *indeed, am lord of the world; but the law is (the lord) of the sea; whatever the Rhodian law prescribes in the premises, let that be adjudged.*" The acknowledgment of the general adaptability of the maritime law "puts in a striking light the tendency towards a common acceptance of the same principles of justice—towards a brotherhood of nations under the same rules of right." "And meanwhile enlightened self-interest discovers that the interest of all are alike promoted."

Asking for the affirmance of the decree in this case, we respectfully submit this brief (though not brief) to the consideration of the Court.

JOHN A. GROW,
*Of Counsel for Appellees.*

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y.

# Supreme Court

## OF THE UNITED STATES.

Catherine A. Rodd, *Administratrix, &c.*,
Appellant,
*vs.*
Henry G. Heartt *et als.*,
Appellees.

*Memorandum on behalf of parties opposing the claim of a maritime lien.*

The learned counsel for the appellees, Mr. Grow, having, since the argument of this case, October 19 and 20, 1874, submitted an elaborate printed brief, in support of the maritime lien in favor of material men against domestic vessels, claimed in this cause, the counsel opposing such claim, while they do not feel at liberty, under the intimation of the court at the close of the argument, to file any further brief, respectfully ask the attention of the court to a case reported in

the 55th volume of the Reports of the New York Court of Appeals, *published since the argument*, viz.:

*Harris* v. *Jex*, 55 N. Y., 421.

In this case the grantee of certain premises, subject to a mortgage executed prior to the Legal Tender Act, tendered payment of the mortgage debt, after the decision of the Supreme Court of the United States (*Hepburn* v. *Griswold*, 8 *Wall.*, 605), and before the reversal of that decision (*Knox* v. *Lee*, 12 *Wall.*, 457), in legal tender notes. The mortgagee relying on the law as established by the Supreme Court, refused to accept the sum tendered, and brought suit to foreclose the mortgage. The court held, unanimously, that the refusal to accept the legal tender notes did not discharge the lien of the mortgage, and say, per ANDREWS, J.: "The plaintiff had a right to repose upon the decision of the highest judicial tribunal in the land. It was as, applied to the relations between these parties, the law and not the mere evidence of the law. Respect for the decisions of courts is a duty inculcated by writers upon the law, and enforced by considerations of public policy. It is said by KENT (1 *Com.*, 476): "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it."

We respectfully submit that the principle of the above decision of the Court of Appeals of New York should be applied in this cause, should the court conclude to reverse the *General Smith* and all the other cases in which it has been adjudged during the last half century, that no maritime lien exists in favor of material men on domestic vessels. This is indispensable to save the rights of all who have reposed upon the previous decisions of this court and regulated their actions and contracts accordingly.

This result would be reached by declaring the rule prospective in its operation, as held by the learned U. S. District and Circuit Judges of New York in the opinions already submitted to the court.

We ask leave also upon the question of the right to process *in rem* as incident to the jurisdiction over the contract, to refer to the very recent case of the *Preve Superiore*, 4 Privy Council Report, Law Reports, Appellate Series, 1874, Part I, August 1, which holds that the English Admiralty Act of 1861 does not confer a maritime lien, and that the Admiralty Court has jurisdiction *in rem* only from the time of the arrest of the vessel (*see* p. 49).

A copy of this memorandum has been furnished to Mr. Grow.

Respectfully submitted by

WILLIAM ALLEN BUTLER,

ANDREW BOARDMAN,

Of Counsel for

HELEN M. FIEDLER, Ex., &c.

FREDK. BUTTERFIELD and others.

# SUPREME COURT

## OF THE UNITED STATES.

CATHARINE A. RODD, ADMINISTRATRIX, &c.,

*versus*

H. G. HEARTT, D. C. McCAN ET ALS.

# ARGUMENT

## Against the Existence of a Maritime Lien for Supplies furnished in the Home Port.

Submitted by leave of Court on behalf of FREDERICK BUTTERFIELD and FREDERICK TAYLOR, Claimants, as Mortgagees, of the proceeds of the Steamships *Columbia*, *Morro Castle* and *Crescent City*.

ANDREW BOARDMAN,

*Of Counsel for Claimants.*

NEW YORK:

EVENING POST STEAM PRESSES, 41 NASSAU ST., COR. LIBERTY.

1874.

Evening Post Steam Presses, 41 Nassau Street, cor Liberty N. Y.

# U. S. Supreme Court.

CATHARINE A. RODD ET AL.

*vs.*

HENRY G. HEARTT ET AL.

No. 266.

**Argument presented by leave of the court on behalf of Frederick Butterfield and Frederick Taylor, claimants, as mortgagees, of the proceeds of the steamships "Crescent City," "Morro Castle" and "Columbia," in the libel suit of James E. Morris and others against the steamship "Crescent City" and the Atlantic Steamship Company, and seventy-eight other suits tried, but undetermined, in the United States District Court for the Eastern District of New York.**

## I.

### HISTORY OF THE CASES.

The facts in these cases may be proper for the consideration of the court by way at least of hypotheses

showing a class of interests to be affected by the decision of the question involved in the case of Rodd *vs.* Heartt.

The amount of the libellants' claims against the *Columbia* exceeds the net proceeds of the sale. The amount of such claims against the *Morro Castle* equals the net proceeds of sale. The net amount of such claims against the *Crescent City* would, if allowed, leave a large part of the purchase money mortgage unpaid and leave nothing for the larger mortgage.

At the commencement of the trials on the 24th of March, 1873, before the Hon. Charles L. Benedict, the libellants admitted the following facts:

1. That the Atlantic Mail Steamship Company is a New York corporation, incorporated more than five years ago, and having its place of business in the city of New York.

2. That all its said vessels, the *Crescent City*, the *Morro Castle* and the *Columbia*, started from the city of New York on their respective voyages, and thence went to Havana and back, touching at Nassau.

3. That all the vessels were registered by the said company in the New York Custom House before any of the transactions occurred, which are the subjects of discussion in these cases.

4. That the mortgage of Taylor on the *Crescent City* is a purchase money mortgage.

5. That both the Taylor and Butterfield mortgages were executed before the furnishing of the supplies, as by the libels claimed, and prior to the last alteration by the Supreme Court of the United States, of the XIIth Rule in Admiralty (May 6, 1872), and both mortgages were recorded in the New York Custom House.

6. That the work done and materials furnished for which the libellants claim liens were done and furnished in the city of New York, the vessels being at the time attached to a wharf in the said city.

7. That in all cases the vessel had made one or more voyages to a foreign port since such work was done and supplies furnished.

8. That in no case has any claim or specification been at any time filed by the libellants in the office of the clerk of the city and county of New York.

9. That the place of business of each libellant was in the city of New York.

## II.

On the above admissions and proof that the libellants had furnished supplies or repairs to the ships in the city of New York, the cases were argued on the contention of the mortgagees, that no maritime lien exists in favor of material men for repairs or supplies furnished to a ship at its home port. It being conceded that if the district judge decided that question in favor of the claimants, it was useless for the libellants to proceed further with their suits.

The learned district judge had his attention called to the views of Judge Blatchford, District Judge for the Southern District of New York, who had decided that no such lien existed (the *Circassian*, Albany Law Journal, Volume 6, page 401; the ship *Edith*, 6th National Bankruptcy Register, p. 449). But Judge Benedict decided that the alteration of the 12th Rule in Admiralty of May 6th, 1872, by the Supreme Court,

was inconsistent with the law as declared in the case of the *General Smith* (4 Wheaton, 438), and he overruled the objection of the claimants upon the point presented, and directed the causes to proceed upon the question whether the supplies sued for were furnished upon the credit of the ships or exclusively upon the credit of their owners.

The further proof was completed in November, 1873.

An appeal had been taken from the decree of Judge Blatchford in the case of the ship *Edith*, which was heard before Mr. Justice Woodruff, Circuit Judge, who, on the 19th day of February, 1874, affirmed that decree, thus deciding against the lien of the material men at the home port and in favor of the mortgagees. A certified copy of the opinion of Judge Woodruff was forwarded to Judge Benedict, but he announced that no decision would be made in any of the above 79 cases until after the decision of the Supreme Court on a reargument of the case of *Rood* vs. *Heartt*. Those cases are, therefore, directly involved in the argument of the present case.

## III.

It is the maritime law of the United States as determined by the Supreme Court fifty-five years ago, and invariably applied by that court, that no maritime lien exists in favor of material men for repairs or supplies furnished to a ship at its home port.

By the maritime law of England material men had no maritime lien upon a domestic ship for supplies at the home port. The admiralty law of England was adopted by her American colonies, and was the common inheritance of the United States. The question first came before the United States Supreme Court in the year 1819, in the case of the *General Smith* (4

Wheaton, 438), when Marshall was Chief Justice, and Story and other eminent jurists, were his associates, and the court unequivocally decided that a material man has not a maritime lien on a domestic ship for supplies at a home port.

The law thus recognized and authoritatively adopted by the Supreme Court has never been by that court departed from. Its soundness and binding force have been recognized whenever there has been occasion for such recognition.

In the *St. Jago de Cuba* (A. D. 1824, 9 Wheaton, 439) an attempt was made to establish a lien for supplies, on the ground that the vessel had been represented as a foreign vessel, and that the supplies were furnished on the faith that she was such. The court held, reversing the decree below, that the materiel men had "not sustained the exception made in the court below in their favor from the general doctrine that *such claims cannot be sustained against a vessel in her home port.*"

In *Ramsay* vs. *Allegre* (A. D. 1827, 12 Wheat., 611) brought by a material man for the supplies furnished the schooner *Dorothea*, at the request of the owner, ship's husband or *consignee* of the vessel, the use of the term consignee indicates that the vessel was not in her home port, but the case turned on another point, and the decree of the court below, dismissing the libel, was affirmed. But Mr. Justice Johnson took occasion to prevent misconception by saying: "*The correctness of the decision in the case of the General Smith cannot be questioned,*" and he places on record a learned and elaborate vindication of that decision as to the point decided, and was for still further restricting the jurisdiction of Courts of Admiralty.

In the *Planter* (A. D. 1833, Peyroux *vs.* Howard, 7 Peters, 323) the court says: "As to repairs or necessaries in the port or State to which the ship belongs, the case is governed altogether by the local law of the State, and no lien is implied unless it is recognized by that law."

In Andrews *vs.* Wall (A. D. 1844, 3 How., 570) Mr. Justice Story reasserts the authority of the *General Smith*. "The general doctrine," he says, "had been previously asserted in the *General Smith* and fully recognized and acted on in *Peyroux* vs. *Howard*."

In the *New Jersey Steam Navigation Company* vs. *Merchants' Bank* (A. D. 1847, 6 How., 344) Mr. Justice Nelson says, in delivering the opinion of the court: "The principle *stated in the General Smith, and which has been repeated in all the subsequent cases*, is that where repairs have been made or necessaries furnished to a foreign ship in the ports of a State to which she does not belong, the general maritime law gives a lien on the ship as security, and the party may maintain a suit in admiralty to enforce his right. *But as to repairs or necessaries in the port or State to which the ship belongs*, the case is governed altogether by the local law of the State, and *no lien is implied* unless recognized by that law. But if the local law gives the lien it may be enforced in admiralty."

In *Thomas* vs. *Osborn* (A. D. 1856, 19 How., 22) the limitation is carefully stated: "The master of a vessel *being in a foreign port* has power, in a case of necessity, to hypothecate the vessel, and also to bind himself and the owners personally for repairs and supplies," and the *General Smith* is the first of the cases quoted by the court.

In the People's Ferry Company *vs.* Beers (A. D. 1857, 20 How., 393), in which the Supreme Court decides that there is no maritime lien acquired by the construction of a vessel, the court says: "It must be borne in mind that liens on vessels encumber commerce and are discouraged; so that where the owner is present no lien is acquired by the material man; *nor is any, where the vessel is supplied or repaired in the home port*" (p. 402).

In the *St. Lawrence*, in which the court enforced a lien created by the laws of the State of New York (A. D. 1861, 1 Black, 522), Mr. Chief Justice Taney,

speaking of the case of the *General Smith* said that it had "always been followed and regarded as a leading one in the Admiralty Courts." Its authority was recognized in the cases of Peyroux *vs.* Howard, The New Orleans *vs.* Phœbus, and others to which it is unnecessary to refer.

In all cases in the Supreme Court, where a maritime lien in favor of material men has been allowed, the indispensable fact is uniformly stated that the repairs or supplies were furnished to the vessel in a *foreign port.* The *Grapeshot* (A. D. 1869, 9 Wall., 129) was a New York vessel, and the repairs were made at Rio J. The *Guy* (9 Wall., 758) was repaired in Baltimore, which was admitted on the record not to be its home port. The *Lulu* (10 Wall., 192) was a New York vessel, and the repairs were made at Baltimore. The *Kalorama* (10 Wall., 204) was owned in New York, and the *Custer* in Georgetown, and the repairs and supplies were furnished in Baltimore. The *Patapsco* (A. D. 1871, 13 Wallace, 329) was owned by a Rhode Island corporation, registered in the name of the president, in New York, and the supplies furnished in Baltimore.

In deciding the case of the *Kalorama*, in December, 1869, being fifty years after the decision of the *General Smith*, Mr. Justice Clifford thus emphatically recognizes the authority of the case of the *General Smith.* "It becomes necessary to define, with some precision what is meant by a maritime lien as affording a security for such advances, and under what circumstances it arises where repairs are made or supplies are furnished to a vessel engaged in commerce or navigation."

"In considering that question it will be sufficient to state that the owner of the steamer throughout that period was a resident of the city of New York, and that the port of *New York was the home port of the steamer,* as conceded by both parties. Proof satisfactory to both courts was introduced, showing that the steamer needed the repairs and supplies when the

advances were made by the libellants, and that they were made *while the steamer was lying in the port of Baltimore*, where the libellants resided."

"Some of the Federal courts, immediately after their organization under the Judiciary Act, decided that repairs made and supplies furnished to a ship, if made and furnished on the credit of the ship, were a lien upon the ship, whether she were at the time in her home port or in a foreign port. Other district judges were of opinion that a maritime lien did not arise if the repairs were made and the supplies were furnished in the home port of the vessel, and some uncertainty prevailed until the same was examined by this court, *when the question was* PUT AT REST." That is by the case of the *General Smith*, to which the judge refers, and he adds that it is not correct to say that the maritime law of the United States follows the civil law in respect to liens, "as the civil law extends that privilege to such repairers and furnishers *without any such distinction between domestic and foreign vessels as that which is constantly maintained in the decisions of this court.*"

Thus, from the earliest decision of the Supreme Court to the latest, the doctrine that there is no lien on a ship for supplies at the home port is unswervingly maintained. There does not exist in the whole judicial history of the Supreme Court of the United States a case in which it has sanctioned the doctrine that a maritime lien exists in favor of material men for supplies or repairs at the home port.

## IV.

THE LAW THAT NO MARITIME LIEN EXISTS AGAINST A SHIP FOR REPAIRS OR SUPPLIES AT THE HOME PORT IS A RULE OF PROPERTY IN THE UNITED STATES. RELYING UPON ITS PROTECTION, CONTRACTS HAVE BEEN ENTERED INTO WHICH NEVER WOULD HAVE BEEN MADE BUT FOR RELIANCE THEREON, AND ITS REVOCATION WOULD BE FOLLOWED BY DISASTROUS LOSSES.

When a statutory rule of property is established, abolished or changed by the Legislature, all prior rights remain unaffected, and all future transactions are entered into in view of the change in the law. If the Legislature should attempt to make a law retrospective so as to affect existing rights, the courts would treat such legislation as unconscionable and void. In England it would be held void as contrary to natural justice, and in the United States as unconstitutional. It would, in effect, be taking one man's money and putting it into other men's pockets. This high court is asked to do that, by a decision, which would be impossible to the legislative power. The rights of the mortgagees, whose property I am here to protect, accrued when the authority of the *General Smith* case was unquestioned, and prior to the last change in the twelfth rule in admiralty. The rights of these mortgagees can be protected in no way known to me except by this august court respecting its own decisions, and leaving the Legislature to alter the law it it ought to be altered, thus protecting the integrity of past transactions ; for it cannot be doubted that the owner of the *Crescent City* would not have parted with his ship, and left two-thirds of the purchase money on mortgage, much less would the other mortgagee have lent the Atlantic Mail Steamship Company $250,000 on their fleet of ships, if they had supposed that all future creditors of the said company for repairs and supplies would have a lien paramount to their mortgages.

It may be said that the rule adopted by Judge Blatchford in the case of the *Circassian* would preserve existing rights, but that decision is assailed as more just than logical. What is a maritime lien? It is a lien not of record, but which travels with the vessel into whosesover possession it may pass, though the transferee may be ignorant of its existence. It is inchoate from the moment the act is done which gives rise to the lien, and when carried into effect by legal process it relates back to that moment of time, and overrides all other rights of property in the ship. If it be decided that the libellants have maritime liens for their supplies and repairs at the home port, it must be decided that they have it by virtue of the general maritime law, and not by virtue of the alteration of the twelfth rule in admiralty, which merely regulates process, and that the alteration of that rule, in May, 1872, merely restored to material men the remedy by which their rights could be enforced. It is hard to answer this argument except by saying that it is better to be just than logical—better to lose sight, for the occasion, of the precise nature of a maritime lien, than to allow those who have parted with their ships or money, relying on the decisions and rules of this court, to be deprived of them, in favor of subsequent creditors, notwithstanding the record notice of their prior claims and liens.

## V.

IF THE QUESTION WHETHER MATERIAL MEN HAVE A LIEN AT THE HOME PORT WERE A NEW QUESTION IT OUGHT TO BE DECIDED AGAINST SUCH LIEN.

The question of whether material men have a maritime lien for supplies furnished to a ship at the home

port was argued in the court below in the cases I represent, and has been usually argued, so far as I have observed, upon the ground whether the grant in the United States Constitution of admiralty jurisdiction to the Supreme Court carried with it by implication the limitation of the power of the court to such jurisdiction as the admiralty courts of England exercised at the time of the adoption of that constitution. It seems to be taken for granted that if no such limitation exists, the ancient rules of the civil law as to maritime liens must, as a necessary result, be adopted by the Supreme Court. The relative merits of the law of England and that of the civil law have been little considered. The adversaries of the limitation placed on admiralty jurisdiction by the common law treat the maritime law as if it sprung from divine inspiration, and that the nearer we can get to its source the purer it must be, instead of treating it in its present form as the result of development, and the outcome of thought and experience. "We are the ancients," said Lord Bacon, having the experience of all prior ages in addition to our own. I respectfully maintain that independently of the principle of *stare decisis*, the rule adopted by the eminent judges of the Supreme Court in 1819 was based on the soundest principles of justice and public policy.

It cannot be questioned that uniformity of law on maritime rights between the two great, practical, contemporaneous, English speaking nations of the eastern and western continents is desirable, and that we should hesitate to destroy the uniformity that now exists.

One chief reason of the courts of common law in England for restricting the jurisdiction of the admiralty courts, was their desire to preserve the right of the subject to the protection of common law principles and processes, and especially the right of trial by jury. The founders of our government were imbued with the same spirit, and preserved to the citizen common law rights, and especially his right to trial by

jury in both civil and criminal cases. There is force in the very learned opinion of Mr. Justice Johnson, in Ramsey *v.* Allegre (12 Wheaton, 611), in denying the right of admiralty to deal, even by an action *in personam*, with transactions between parties in the home port. But what is worthy of profoundest attention in the consideration of this question is the spirit of openness the freedom from embarrassment in dealing with chattels and the hatred of secret liens which pervades the English law, and which was the inheritance of the United States, and the great importance that the maritime law shall be as little of a departure from the common law as is consistent with the exigencies of the case. Where a party was bound by law to render a service, as in the case of the innkeeper, the common carrier and the farrier, the common law gave him a lien on the property put in his charge. So the tradesman to whom goods were delivered for the execution of the purposes of his trade upon them, had a particular lien upon them ; but in the general interests of trade, the moment any of these things were voluntarily parted with the lien was gone. So no man, as against third parties, could have the rights of mortgagee or vendee as to chattels remaining in the possession of the mortgagor or vendor, until, as to mortgages, provision was made by statute for a lien by public record. In the interests of trade and commerce, possession of chattels by a party was as far as possible treated as conclusive evidence of the right of disposition. It is even more important in the United States, in the interests of trade and commerce, and in view of the continual necessity that skill, enterprise and labor are under to call on capital for aid. It may be of the utmost importance, not only to an individual but to a whole community, that communication shall be established between it and distant parts, and there may be no way of doing this except by the contributions of various parties. By the shipbuilder giving credit for part of the price of the ship, taking and filing a mort-

gage on the ship for part of the purchase money. By the public-spirited capitalist lending money for the outfit of the ship, taking a mortgage for the repayment of the loan. The shopkeepers and mechanics have in the ship a new source of custom, and a new impulse is given to trade. The mortgagees have to run the risks to their liens arising from shipwreck, collision, disasters in foreign parts and the nonpayment of wages. These risks make it difficult to obtain such credits, but add to these risks the new one proposed, that for supplies and repairs at the home port there shall be a paramount maritime lien superseding their mortgages, and to obtain such mortgage credits would become impossible. The libels which I am now contesting struck dead all possibility, in the city of New York, of borrowing money on the security of mortgages on ships.

Secret liens are the bane of free trade. Maritime liens are of this secret character, inhering in the thing itself, with no record to give warning of their existence; a fatal blot, it may be, in the title of the *bona fide* purchaser or mortgagee by which his property in the thing may be totally destroyed. Nothing but reasons of paramount necessity should lead a court to sanction such liens. The Supreme Court has, hitherto, been governed by these wise views, but is now asked to put them all aside.

The reasons for allowing a maritime lien are well stated by this court in many cases. In one of these, *The St. Jago de Cuba* (9 Wheaton, 416), the court says that the whole object of giving admiralty process and priority of payment to privileged creditors, is *to furnish wings to the ship* in order to *get her back* for the benefit of all concerned—that is to *complete her voyage.* The vessel must get on; this consideration controls every other. For these purposes, the law maritime attaches to the office of ship master the power of subjecting the vessel to material men. The necessities of commerce require that *when remote from his owner* he

should be able to subject his owner's property to that liability. "*But when the owner is present* the reason ceases, and the *the contract is inferred to be with the owner himself*, on his ordinary responsibility, *without a view to the vessel* as the fund from which compensation is to be derived. From this view of the subject, this court will be best understood when it speaks of the *home port* of the vessel, an epithet which has no reference to State or other limits." The court then decides under the doctrine of estoppel, "that real owners of a vessel, who have, themselves, contributed to give her a foreign aspect or character, hold out a foreign captain to material men, as legally authorized to exercise the rights and powers over his vessel which appertain to a foreign vessel, are precluded by their own act from denying her foreign character." The court then examined the evidence and concludes that the material men were in possession of facts to put them on enquiry as to the character of the vessel, which was in fact in her home port, disallowed their claims and reversed the decision in their favor made in the court below.

But to maintain a maritime lien in behalf of material men for supplies to a ship away from the home port even, "there must," as was said by Chief Justice Chase, "be *an apparent necessity for the credit* as well *an actual neeessity for the supplies.*" The cases do not differ as to the necessity of both these elements being essential to the creation of a maritime lien, but merely as to the evidence from which such necessity may be presumed.

Pratt *vs.* Reed, 19 How., 359.
The *Grapeshot*, 9 Wallace, 129.
The *James Guy*, 9 Wallace, 758.
The *Lulu*, 10 Wallace, 192.
The *Patapsco*, 13 Wallace, 329.

In the case of the *Grapeshot*, 9 Wallace, 758, the Supreme Court considered this question very elaborately, and with the manifest intent of treating lien claimants with all the favor that the most liberal view

of their rights would allow. Yet what is the language of the court in that case? "Where the claim of the material man is against the owner only, and no privilege is given upon the vessel, no necessity need be shown affirmatively. The master, in the absence of known fraud, is fully authorized to represent the owners in all matters relating to the ship. * * * But something more is required when the claim is against the ship itself. * * * Such a lien for supplies and materials or for money advanced for the ship, since it is created and exists without record, or other public notice, *can only be established upon circumstances of actual necessity.*" But the court adds, "Proof of absolute and indispensable necessity, however, is not required in order to the establishment of such a lien, where supplies and materials are furnished on the credit of the ship, or the ship and owners, *in a foreign port.*" It is enough in such case if it appear by "proof that the furnishing was in good faith, on the order of the master, and really necessary, or honestly and reasonably believed by the furnisher to be necessary for the ship."

In the case of *Patapsco* a lien was established on the ship for a supply of coal. The vessel was chartered by a Rhode Island corporation, and used to convey freight and passengers between New York and Baltimore. The court said that the case was "not without its embarrassments," but that the weight of evidence was in favor of a lien against the ship. What that evidence was which turned the scale in favor of the lien is thus stated by the court: "It is undisputed that the *Patapsco* was *in a foreign port*, and that the coal was ordered for her specifically by name, and delivered to the officers in charge of her. It is equally free from dispute that the supply of coal was necessary—indeed indispensable—to make her voyage at all. In such case the inference is that the credit was given to the vessel, unless it can be inferred that the master had funds or the owners had credit, and that the ma-

terial man knew of this, or knew of such facts as should have put him on inquiry. There is no reason to suppose that the masters had funds, or the owners credit, nor that the libellant was guilty of laches."

13 Wallace, 323.

In all cases necessity, exigency, absence of the ship from the home port, are essential to the creation of a maritime lien. There has never been a case in which the Supreme Court has sanctioned a lien for supplies in which these elements did not exist.

It follows from these premises that *a maritime lien on a ship for supplies cannot be created at the home port of the vessel where also the owners reside and are present*, for, under those circumstances, the essential elements of the maritime lien cannot exist. It has been well said by an able writer (Am. Law. Jour., vol. 5, p. 581): "If repairs are made on vessels at their home ports, the general maritime law has a *conclusive presumption* that they are made on the personal credit of the owner and allows no lien."

When the ship has brought her cargo home, and is in charge of her owners, there is no necessity that she should start on a new voyage; at least no such necessity as the maritime law recognizes as sufficient to create in favor of those who furnish supplies a lien which, to use the language of Chief Justice Chase in the *Grapeshot*, "is created and exists without record or other public notice."

If the owners have not the means to run ships, let them abandon the business, unless they have sufficient consideration in the community to be able to obtain personal credit. If they must raise money on the credit of the ship, let them do it by mortgage, which is matter of record. But let no extension be given to the right to secret liens.

A reversal of this rule would lead to other disastrous results, and very often be an excuse for negligence if not for actual fraud. By giving to material men at the

port a lien on the ship, he has no need to care about the responsibility of the owner, nor to examine the records to see whether it is mortgaged. He would have the ship as his security, and would override the prior mortgage. Or he might collude with the owner to defraud the mortgagee by allowing the owner to put the earnings in his pocket whilst the price of the supplies were accumulating against the ships. The ships, the proceeds of which I claim, were run to Havana by the Atlantic Mail Steamship Company, at an average expense of eleven thousand dollars a round voyage, and each ship made seventeen voyages a year. The yearly expenses being about a hundred and ninety thousand dollars a year; about a hundred thousand dollars of this was for supplies by material men in New York, who, by giving credit, could in that time cover far more than any of the vessels brought, sold as they were at public auction for cash, on judicial process.

On the other hand, it would put it in the power of every man who had the smallest claim against a ship to harass and trouble it by a libel in the home port, and arrest its sailing if his claim and the expenses of suit were not immediately paid, or a bond executed to stand in place of the ship to answer his claim. A course that would often be resorted to at the last moment to force a settlement, in order to avoid the detention of freight and passengers. The probability being that it would be most readily resorted to by those the justice of whose claims was questioned.

The court may well shrink from the confusion and uncertainty that the reversal of the present rule would introduce. Man is not gifted with the prescience which enables him to foresee the manifold bearings of such a change. If the maritime law, as settled in England and up to this time in the United States, is to be set aside, where shall we look for guides and precedents. Shall we go to the Rhodian laws, to the Athenian laws, to the Roman laws, to the *Consoleto del Mare*, to the laws of Oleron, to the ordinances of the Hanse Towns,

to the practice of the Lord High Admiral of England, prior to the statutes of Richard the Second, or must we seek some more ancient, and therefore purer, source?

The maritime law is, that the last maritime lien takes precedence of all that precede it (*The St. Jago de Cuba*, 9 Wheat., 416). In the cases I represent, there are bills for repairs and bills of grocers, butchers, bakers and wine and liquor dealers and tobacconists, for several successive voyages to Havana. Upon what principle of maritime necessity will the court place its decision as to the relative priority of these liens on each voyage and as to successive voyages? Will it decide that, as to repairs, that as they were completed before the ship was victualled and the repairs would have been useless unless the ship had gone to sea, and that as she could not go to sea without victuals, the victualler's lien shall have priority over the mechanic's? Then, again, if there is not enough to pay the butcher and baker and wine merchant, will the court undertake to determine the relative maritime necessity of bread and grog? As between libellants for supplies on successive voyages where the shipowner has not paid for victualling the ship on a former voyage, will the court determine that it was a *maritime necessity* that another voyage should be made in order to enable the shipowner to pay his debts to the former victuallers, and that in doing so, it is proper that the lien of the first victuallers shall be overridden by the lien of the last. It has been decided, indeed, by the Supreme Court of the State of New York (5 Wendell, 510) that articles used for daily consumption cannot be deemed to be within the term "supplies," for which a seller may have a lien, but it is for just such things that liens are claimed in most of the libels I am contesting.

At present all the decisions of this court are harmonious. If there be a change, such as is now asked for, consistency will require other changes. This court has decided that no maritime lien is acquired

by the construction of a vessel. (The People's Ferry Company *vs.* Beers, 20 How., 393.) The court says, "It must be borne in mind that *liens on vessels incumber commerce and are discouraged;* so that *when the owner is present no lien is acquired* by the material-man, nor is any where the vessel is supplied or repaired in the home port."

The rule now is that though the seamen have a maritime lien for their wages the master has not, *because he makes his contract directly with the owner*, and is presumed to trust to his personal responsibility. (Steamboat *Orleans vs.* Phœbus, 11 Peters, 180.)

Stevedores have for their wages no maritime lien, though they load and unload the ship; because the ship at the wharf is presumed to be in possession of the owner, and the credit to be given to him.

The case of the material-man at the home port is certainly not stronger than that of the shipbuilder, the shipmaster and the stevedore.

So far from there being any reason or necessity for a reversal of the doctrine that material-men have not a maritime lien for supplies at the home port, the rule is in the highest degree just, fair and reasonable, and most favorable to commercial dealings and prosperity.

## VI.

THE LAST ALTERATION OF THE TWELFTH RULE IN ADMIRALTY DOES NOT ASSUME TO GIVE TO MATERIAL-MEN A MARITIME LIEN ON A DOMESTIC VESSEL.

By the Acts of Congress of May 8th, 1792, and the 23d of August, 1842, the Supreme Court of the United States was authorized to regulate "forms and modes of proceedings in suits." These laws confer no power to affect the legal rights of parties.

Many of the States at an early period undertook to give liens on vessels to material-men. Thus the State of New York passed an act on the 10th of August, 1798, giving a lien on the ships and vessels of non-resident owners; but the act provides "that the lien shall cease immediately after such ship or vessel shall have left this State" (§ 5).

This was amended by the Act of the 28th of February, 1817, which extended the lien to vessels owned by residents of the State with a proviso "that the said lien shall in no case endure beyond twelve days after such ship or vessel shall leave the port."

It may be mentioned, in passing, that the Supreme Court of New York, in construing this act in a case claiming a lien for fuel, decided that the supplies mentioned in the act "must be such as to go towards the building, repairing, fitting, furnishing, or equipping a vessel;" and that no lien existed for fuel, or any articles "which were daily consumed and constantly replaced," such as the articles supplied by "the butcher, or baker, or grocer."

Johnson *v.* The steamboat *Sandusky*, 5 Wendell, 510.

By the Act of 24th April, 1862 (Chap. 482), a more elaborate lien law was passed. It was a futile attempt to create a State Court of Admiralty. It provided, however, that the lien should cease after the departure of the vessel from port, unless specifications of the claim were drawn up, sworn to, and filed within twelve days after such departure.

It is to the difficulty of dealing with the liens conferred by State laws, and the confusion incident to the attempt to administer these local laws by the machinery of courts of admiralty, that the changes in the twelfth rule in admiralty are owing.

The rule of 1844 initiated the difficulty, by the words "proceedings *in rem* shall apply to cases of domestic ships where, by the local law, a lien is given to

material-men for supplies, repairs, or other necessaries." It assumed the law to be settled that liens given by local laws might be enforced in the admiralty courts of the United States. Yet, in 1857, the court, in McCormick *v.* Talcott, 20 How., 402, as to local liens, said, that though "district courts have recognized admiralty jurisdiction *in rem* against a vessel to enforce a carpenter's bill for work and materials furnished in constructing it, in cases where a lien had been created by the local law of the State where the vessel was built. Thus far, however, in our judicial history, no case of the kind has been sanctioned by this court." I suggest, with great deference, that the Supreme Court committed an error in ever entertaining a suit in admiralty *in rem* to enforce a State lien. That the true rule was to declare that no such lien either conferred jurisdiction *in rem* or warranted its exercise. If the court by *other proceedings in rem* had obtained control of the ship or its proceeds, then all claimants having a lien in any way might come in and have their rights adjudicated in admiralty, but the court, in seizing the vessel, must obtain jurisdiction by the presentation of a libel setting forth a maritime lien existing by virtue of the maritime law. The action of the court in the *St. Jago de Cuba* was in conformity with this view.

The embarrassment which resulted from the attempt to enforce State liens in admiralty resulted in the alteration of the twelfth rule in 1859, which, after providing for process *in rem* or *in personam*, in respect to supplies or repairs for a foreign ship, or for a ship in a foreign port, says: "And the like proceedings *in personam*, but not *in rem* shall apply to cases of domestic ships for supplies, repairs or other necessaries." The reasons for this alteration are very fully explained by Chief Justice Taney in the *St. Lawrence*, 1 Black, 522, and by Judge Nelson in the *Goliath*, 21 How., 248, in which the court says: "We have at this term amended the twelfth rule of the admiralty, so as to

take from the district courts the right of proceeding *in rem* against a domestic vessel for supplies and repairs which had been assumed upon the authority of a lien given by State laws, *it being conceded that no such lien existed according to the admiralty law.*"

The objection to this alteration was that the court seemed to attempt to do by rule that which should only be done by a decision in a case in which the question as to the jurisdiction of district courts to proceed *in rem* against domestic vessels for supplies and repairs came up between parties, as it did to some extent in the *St. Jago de Cuba*. It was not a proper exercise of the power of the court over forms of process to prevent parties from being heard in court on the question whether they had a maritime lien either by general or local law. To correct the errors that had been embodied in both the rule of 1844 and that of 1859 the rule was amended in 1872. That rule in its present form merely provides in case of material-men for process *in rem* and process *in personam*, without undertaking to define the cases in which the one process may be used and in which the other—"In all suits by material-men the libellant may proceed * * *in rem* or * * *in personam*," as his case requires. The questions of liens and rights are left to be determined by the general principles of maritime law and adjudicated cases. To put any other construction upon the new rule would be to suppose that the court had undertaken to reverse its decisions as to the *legal rights* of parties by a mere rule of court relating to practice. To decide, for instance, upon the rights of my clients without hearing or day in court. The new rule leaves a party to select such remedy as he may deem himself entitled to, and try the question whether in any given case he has a maritime lien or not. The court can by its rules affect modes of procedure, but cannot affect legal rights.

Wayman *vs.* Southard, 10 Wheat., 1.
Steamboat *Orleans vs.* Phœbus, 11 Pet., 175.

## VII.

I ought not to conclude without noticing a remark that I have seen of late, that there is something like general dissatisfaction with the decision in the *General Smith* case. The allegation fills me with a feeling akin to amazement, for on that subject I am in a position to speak from knowledge. I am the counsel of steamship companies, and have intimate relations with some of the largest steamship owners in the United States, and with ship brokers. The latter state that the knowledge that this question has been raised has rendered it impossible to get capitalists to lend money on the security of ships, and well-nigh impossible to get credit for part of the purchase money; and the former, that it is a serious blow to the shipping interest and to the free transfer of shipping property. I know of none who find fault with the law as it stands, except those who, like the libellants I oppose, have been making their profits out of the shipowners for years, and at length, being in danger of loss, prefer that the prior mortgagees should bear it and proctors in admiralty to whom largely increased litigation is not undesirable. Why embarrass commercial operations and property in favor of men who, being where the owner resides, deal with him as other men deal, on his personal responsibility? If they want security let them get it by way of guarantee, or endorsement, or by a mortgage lien—a lien of public record accessible to all—which gives preference in the order of priority, and not by a secret lien which may supersede all others. A class of liens in which, after the manner of a scrub race, the one that comes in last wins.

Respectfully submitted, by special leave of the court.

ANDREW BOARDMAN,
Of Counsel of the Claimants of the proceeds of the steamships *Crescent City*, *Morro Castle* and *Columbia*, in the District Court for the Eastern District of New York.

# Supreme Court of the United States.

October Term—1874.

CATHARINE A. RODD ET AL.,
*Appellants,*

*vs.*.

HENRY G. HEARTT ET AL.,
*Appellees.*

BRIEF, in opposition to the claim of a maritime lien for supplies furnished to a ship in her home-port; submitted in this cause, by leave of the court, on behalf of Helen M. Fiedler, Executrix of Ernest Fiedler, deceased, Claimant and Appellee, in the case of Henry N. Wickes vs. the Steamship "Circassian" pending in this Court; on Appeal from the U. S. Circuit Court for the Southern District of New York.

WILLIAM ALLEN BUTLER,
*Of Counsel for* HELEN M. FIEDLER, *Executrix.*

# Supreme Court of the United States.

OCTOBER TERM, 1874.

CATHARINE A. RODD *et al.*,
Appellants,

*vs.*

HENRY G. HEARTT *et al.*,
Appellees.

## BRIEF

*On the question of the right to a maritime lien for supplies furnished to a ship in her home port, and in opposition to such alleged right.*

Submitted, by leave of the court, by the counsel for Helen M. Fiedler, executrix of Ernest Fiedler, deceased, claimant and appellee in the case of Henry N. Wickes libellant and appellant, *vs.* The Steamship *Circassian*, pending in this Court, on appeal from the United States Circuit Court, Southern District of New York, and involving the same question.

### Introductory Statement.

The steamship *Circassian*, owned in the port of New York, was mortgaged, in June, 1866, to Ernest Fiedler, a merchant of that city, to secure the sum of $90,000 with power of sale in

case of default in payment. After the making of the mortgage, supplies of coal and other necessaries were furnished to her in her home port, where her owner resided. Proceedings were taken to enforce the lien given by the statute of New York, to material men for such supplies, and the vessel was seized and sold under warrants issued in favor of such material men.

The purchaser assigned to Fiedler, the mortgagee. Fiedler paid the purchase money into court, and commenced an action to have the proceedings and sale declared void and the money refunded. Default having been made in the payment of the mortgage debt, Fiedler, the mortgagee, then duly sold the vessel at public auction under the power of sale in the mortgage, November 17, 1868. The purchaser at this sale afterwards conveyed the vessel to Fiedler. The proceedings under the State lien law were set aside on the ground of the invalidity of the State law, pursuant to the decision of the Court of Appeals of New York in the *Josephine*, 39 N. Y., 19.

The *Circassian* was thereafter employed by Fiedler in general commerce. Fiedler died in January, 1872, leaving a will by which his wife, Helen M. Fiedler, was appointed executrix.

On May 27, 1872, the *Circassian* being then in New York in Mrs. Fiedler's possession, was seized under process *in rem* issued out of the United States District Court for the Southern District of New York, to enforce alleged maritime liens for the identical coals and necessaries furnished to her in 1866 by material men who had proceeded against her in 1866, under the State law. Numerous libels were filed for claims amounting to upwards of $40,000, and it was claimed by libellants that a maritime lien existed in their favor which could be enforced *in rem* under Admiralty Rule XII as amended May 6, 1872.

The case of Wickes was tried; the District Court dismissed the libel and the Circuit Court on appeal affirmed the decree; whereupon Wickes appealed to this court.

## FIRST POINT.

It is settled, as a part of the general maritime law in force in the United States, that in the case of materials and supplies to a domestic vessel in her home port, no maritime lien exists or can be implied. Although the contract is maritime, there is no maritime lien.

This has been the law as established and applied by this court *"for more than half a century"* (*See per* CLIFFORD, *J., in Wilson* v. *Bell, Dec. Term*, 1873, *citing the General Smith, decided in* 1819, 4 *Wheat.*, 443.)

A review of the decisions of this court on the subject will make it apparent that this rule of law is not only the result of solemn adjudication, undisturbed during a period of over fifty years, but also that it has been reiterated with marked frequency and after the most careful and thorough scrutiny and deliberation.

It is not an open question, and should not be reopened.

As early as 1815, four years before the decision of the *General Smith*, Judge Story had said in the *Jerusalem*, 2 Gal., 345, *p.* 349: "I hold that the contract for repairs in this case, being of a foreign ship, is to be governed by the maritime law and created a lien. Whether, in the case of a domestic ship, material men have a lien for supplies and repairs furnished at the port where the owner resides, I give no opinion. There are great authorities on both sides of the question. He cites the *Sandwich*, decided by Judge Winchester, in Maryland, 1 *Peters Dec.*, 233, *note*, as a decision in support of the lien by a judge, "than whom no man in the United States ever better understood the true principles and doctrine of the admiralty law." Other district judges held that the maritime lien did not arise.

"Some uncertainty for a time prevailed upon the subject, *until the same was examined by this Court, when the question was set at rest*" (CLIFFORD, *J., in the Kalorama*, 10 Wall., 208, *p.* 212), by the case next cited.

*The General Smith*, 4 Wheat., 443, (*March* 10, 1819). In this case Judge STORY, himself, who had declared (2 Gal., 349) that he should assert "the original inherent powers of the admiralty in the full extent in which they were recognized in England until the unhappy controversies with the courts of common law," delivered the unanimous opinion of the court. The United States District Court of Maryland had decreed, *in rem*, in favor of a material man for supplies in a home port. The local law of Maryland gave him no lien. It was argued, at bar, in support of the decree, that the question of *jurisdiction* and *lien* were inseparable, and that if the admiralty had cognizance of the contract as a maritime contract, so as to enforce it *in personam*, it had jurisdiction to enforce it *in rem*, citing the *Sandwich* as the leading authority. Mr. Pinckney, for the claimants, conceded the admiralty jurisdiction over the contract as maritime, but he insisted that there was no maritime lien. The Court say: "If this had been a suit *in personam*, there would not have been any hesitation in sustaining the jurisdiction of the District Court. Where, however, the proceeding is *in rem*, to enforce a specific lien, it is incumbent on those who seek the aid of the court to establish the existence of such lien. Where repairs or necessaries have been furnished to a foreign ship, *the general maritime law*, following the civil law, gives the party a lien on the ship itself for his security. But in respect to repairs and necessaries in the port or State to which the ship belongs, the case is governed altogether by the municipal law of that State, and no lien is implied unless it is recognized by that law." Thus the doctrine of the *Sandwich*, despite the high reputation of Judge Winchester, was rejected.

In view of this decision "most or all of the States enacted laws giving a lien for the protection of material men in such cases." (Per CLIFFORD, J., in *Wilson* vs. *Bell*, October Term, 1873.) It was assumed, as stated in Mr. Wheaton's note (4 Wheat., 444) that the lien given by the local law might be enforced upon the principle stated in the *General Smith*, by a suit *in rem* in the Admiralty.

In the *St. Jago de Cuba*, 9 Wheat., 409 (*March* 15, 1824), Mr. Justice JOHNSON delivered the opinion of the court, reversing,

upon the facts, a decree of the Circuit Court of Maryland, sustaining a lien on a vessel which had, as it was alleged, though in her home port, been falsely held out as a foreign vessel. The court held that the facts did not sustain the allegation, and that the claim to a lien by the material men must be denied "*from the general doctrine that such claim cannot be sustained against a vessel in her home port.*"

In 1827 the case of *Ramsay* vs. *Allegre*, 12 Wheat., 611, *(January Term,)* 1827, came up on appeal from the Circuit Court of Maryland, in which a libel *in personam* had been filed by a material man against the owner of a domestic vessel. It appeared that he had accepted a negotiable promissory note for the debt, which was outstanding, and, on this ground alone, the decree dismissing the libel was affirmed. But this case presented the question whether the Admiralty Court had jurisdiction at all *in personam*, where it could not exercise a jurisdiction *in rem*. The court declined to consider the question of jurisdiction (per MARSHALL, C. J., p. 614), but Judge JOHNSON delivered an opinion on this point (pp. 614-640), in which he reviewed the authorities and insisted that the Admiralty had no jurisdiction in cases of materials furnished in a home port either *in personam* or *in rem*, and he claimed that the case of *General Smith* was not an authority to the effect that they had such jurisdiction, and that Judge Story's *dictum*, that if the material men had sued *in personam* there would have been no doubt as to their right to proceed, was an error, based on Mr. Pinckney's admission, unsupported by authority.

The question, in all its aspects, having thus been repeatedly before the court, and the very elaborate opinion of Judge Johnson having distinctly called in question the correctness of the decision in the *General Smith*, in asserting the admiralty jurisdiction *in personam*, it is apparent that unusual importance must have attached to the next case coming before the court involving these points. This was

*Peyroux* v. *Howard*, 7 Pet., 324 (*January Term*, 1833). In this case the libel was filed in the U. S. District Court of Louis-

iana, by material men against the steamboat *Planter* for repairs, in New Orleans, her home port. It alleged that the libellants had a lien on vessel *by the Admiralty Law* (p. 325), and also by the local law of Louisania, and it was argued by Edward Livingston (p. 336), that the general maritime law gave a lien as well as the State law. Mr. Livingston conceded (p. 337) that a State law could not give jurisdiction to the courts of the U. S., but he claimed that it could create a right which could only be enforced in the U. S. courts. On the decision of this case neither Judge STORY nor Judge JOHNSON, by whom, respectively, opinions had been delivered in the *General Smith*, the *St. Jago de Cuba*, and in *Ramsay* v. *Allegre*, delivered opinions. The court, by Mr. Justice THOMPSON, (no member of it dissenting) expressly sustained the doctrine of the *General Smith* in every particular, and held explicitly: *First.*—That no lien is given or "implied" by the maritime law in the case of a domestic ship. *Second.*—That if the local law gives the lien it may be *enforced* in the admiralty.

*N. B.*—In his opinion, Judge Thompson inaccurately says that the *Gen. Smith* decided that "the jurisdiction of the admiralty in such cases, where the repairs are upon a domestic ship, depends upon the local law of the State." This inadvertent remark was corrected by the court in the next case. (*See* 11 *Pet.*, 184.)

In *Steamboat Orleans* v. *Phœbus*, 11 Peters, 175 (*January Term*, 1837), a master of a vessel had sued in admiralty in the U. S. District Court of Louisiana, for his wages; the State law gave him a lien, and process *in rem* had issued out of the U. S. District Court to enforce it, based on the decision of *Peyroux* v. *Howard*. But on appeal the Supreme Court held that the *contract not being maritime*, the District Court had no jurisdiction.

The court say, Judge STORY delivering the opinion, that the contract is not maritime, and then proceed as follows:

"But it is said that the law of Louisiana creates a lien in favor of the master of a vessel, and if so, it may, upon the principle recognized by this court in *Peyroux* v. *Howard*, 7 Pet., 343, be enforced in the admiralty. That decision does not authorize any such conclusion. In that case the contract was treated as a maritime contract, and the lien under the State

law was enforced in the admiralty on the ground that the court, under such circumstances, had jurisdiction of the contract as maritime, and then the lien being attached to it might be enforced according to the mode of administering remedies in the admiralty. *The local laws can never confer jurisdiction on the courts of the United States.* They can only furnish rules to ascertain the rights of parties, and thus assist in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States." (11 Pet., 184.)

Thus the law stood when Congress, by the Act of August 23, 1842 (5 U. S. Statutes at L., 499), provided for the adoption by the Supreme Court of rules of practice in the courts of the United States in causes of admiralty and maritime jurisdiction. The court, in December Term, 1844, promulgated such rules, to take effect September 1, 1845.

*See* 20 *How. Rules*, p. 3–14.

Rule XII was as follows:

"Rule XII. In all suits by material men for supplies, repairs or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*, and the like proceeding *in rem* shall apply to cases of domestic ships, where, by the *local law, a lien is given to material men for supplies, repairs and other necessaries.*"

This rule simply embodied the results of the previous decisions of the Supreme Court in the cases of the *General Smith* and *Peyroux* v. *Howard*, above cited. It neither enlarged nor curtailed the original jurisdiction of the Admiralty Courts under the Constitution and Judiciary Act.

It only regulated the practice by which a non-maritime lien given by a local law was allowed to be enforced by the Admiralty Courts in a case where the contract was maritime, and in none other.

From 1845 to 1858 the rule, as above cited, was in force, and there was no departure from the principles laid down in the *General Smith*, which was regarded as carrying the Admiralty jurisdiction to the extreme, and Mr. Justice DANIEL says, in

*Ward* v. *Peck*, 18 How., 267, that "a great portion of the Admiralty jurisdiction now permitted in this country may be traced to a *dictum* in argument in the case of the *General Smith*, in the assertion of a doctrine (*i. e.*, the jurisdiction *in personam*), which, if now for the first time, discussed and examined, might not command the sanction of this tribunal."

*N. J. Steam Nav. Co.* v. *Merchants' Bank*, 6 *How.*, 344 (Dec. Term, 1847). In this case the court held that the admiralty jurisdiction in the United States extended under the principles of the general maritime law, to contracts of a foreign government though not recognizable in England by the admiralty, and the court, per NELSON, J., in illustrating the distinction between the limits of the English admiralty jurisdiction and our own, and by way of defining the "*line of jurisdiction*" (p. 735), say that our Admiralty Courts "*exercise jurisdiction*" (p. 734), in suits by material men for supplies to a foreign ship and in the home-port if the municipal laws give a lien, and add: "as to repairs and necessaries in the port * to which the ship belongs * no lien is implied unless recognized by that law."

In the *People's Ferry Co.* vs. *Beers*, 20 How., 393 (*December Term*, 1857), a lien given by the local law of New York, for *building* the hull of a vessel (not for repairs or supplies), was sought to be enforced in admiralty. The District Court decreed in favor of libellants. This court reversed the decree, holding the contract not maritime, and that therefore no lien given by the local law could be enforced in admiralty.

The Court say, also: "Liens on vessels encumber commerce, and are discouraged; so that when the owner is present no lien is acquired by the material man, *nor is any when the vessel is supplied or repaired in the home port.*" It had been strenuously insisted that the general maritime law favored liens (*see Benedict arguendo*, p. 397, *et seq.*), and the court was urged not to "deprive the admiralty of a large part of its jurisdiction on the narrow English doctrines of two hundred years ago," and reliance was placed on the investigations and decisions of the Supreme Court in this branch of jurisprudence during former years.

But not only did this court unanimously reverse the decree in favor of the shipwrights, it also repealed its own Rule XII at the next term, and abandoned, as an "error," the attempt to enforce a lien in favor of material men in cases where no lien existed by the maritime law, and where the only lien was given by the State law.

This was done deliberately, after full consideration of the subject, and despite urgent appeals in the interest of the material men. Light is thrown upon the action of the court in repealing the rule by the case of *Taylor* vs. *Carryl's Exrs.*, 20 How., 583 (*also December Term*, 1857), involving a conflict between State and Federal jurisdiction and liens, and which, after being thrice argued at the bar (*see p.* 594), was decided in favor of the claimant under the State process by a bare majority; C. J. TANEY and JJ. WAYNE, GRIER and CLIFFORD dissenting, and holding that no common law process issued out of a State court could divest or affect a maritime lien arising from a maritime contract and existing upon the vessel *in specie* as "*an admitted maritime lien*," *see p.* 601.

The new and "substituted" Rule was as follows (see 21. How., p. 11):

"Rule XII. In all suits by material men for supplies or repairs or other necessaries for a foreign ship of for a ship in a foreign port, the libellant may proceed against the ship or freight *in rem*, or against the master or owner alone *in personam*, and the like proceedings *in personam*, but not *in rem*, shall apply in cases of domestic ships for supplies, repairs or other necessaries."

The court gave its own explanation of this change of the rule, in the case of *Maguire* v. *Card*, which was decided immediately after the alteration and which is reported in the same volume containing the new rule (see 21 How., 248, Dec. Term, 1858). They say: "We have, at this term, amended the 12th rule of the admiralty, so as to take from the District Courts the right of proceeding *in rem* against a domestic vessel for supplies and repairs which had been assumed upon the authority of a lien given by State laws, *it being conceded that no such lien existed according to the admiralty* law thereby correct-

ing an error which had its origin in the court in the case of the *General Smith* * * * We have determined to leave all these liens depending upon State laws, and not arising out of the maritime contract, to be enforced by the State courts."

The precise "error" which had its "origin" in the *General Smith* was explained by the court to consist in allowing the use of the process *in rem* to enforce a lien which was not maritime, and which had no existence in the admiralty law. It did not touch the question of the power of the States to create such liens, nor the question of the admiralty jurisdiction *over the contract.*

In *The St. Lawrence*, 1 Black, 522 (*Dec. Term*, 1861), the precise distinction between the jurisdiction of the Admiralty Court in respect to the maritime contract and its want of power in respect to the lien, was explained and made clear. In this case the libellants had, before the alteration of the 12th Rule, filed their libel *in rem* in the U. S. District Court, for supplies furnished in New York, the home port, alleging the maritime contract and the lien by the local law. They had a decree. Pending the suit the 12th Rule was changed, and it was claimed that the right to process *in rem* being no longer in existence, the District Court had no jurisdiction over the cause. But this court held: *First.*—That the Admiralty Court had jurisdiction, the contract being maritime. *Second.*—That it had not jurisdiction to issue process *in rem*, inasmuch as the principles of the civil law, by which a maritime lien is given in the case of a domestic vessel, "*form no part of the admiralty and maritime jurisdiction conferred on the Government of the United States.*" *Third.*—That wherever a lien exists in the case of a domestic vessel, it is not maritime, but is created by local law, either civil or municipal. *Fourth.*—That it was matter of discretion and propriety and not of jurisdiction, whether the use of the process *in rem* should be permitted by the Supreme Court to be used in a suit in which the contract was maritime, to enforce the lien of the material men on a domestic vessel, given by local laws. *Fifth.*—That the use of the process had been "found to be inconvenient in most cases, and absolutely impracticable in others," for which reason the rule

sanctioning it had been repealed. *Sixth.*—That the rule was wholly prospective in its application and did not affect proceedings commenced before it went into operation.

NOTE.—That C. J. TANEY, in the course of the Opinion, of which the above is a careful and strictly accurate analysis, says that the local law gave "an undoubted lien," thus recognizing the power of the State to create such a lien, wholly *irrespective* of the question how it was to be enforced.

*See for reaffirmance of the St. Lawrence, The ship Potomac,* 2 Black, 581.

During the forty years in which the use of the admiralty process *in rem* had been allowed by the Supreme Court in cases of maritime contract, in aid of the lien on domestic vessels given by local law, no question had arisen as to the power of a State to enforce such liens by direct proceedings *in rem* in its own courts.

But the admiralty process *in rem* being no longer available, the local lien could be enforced only by the proceedings which the State law prescribed. The question at once arose whether, in cases where the contract was maritime, the State courts had any jurisdiction to authorize and enforce a direct proceeding *in rem.*

This question was determined in the *Moses Taylor,* 4 Wall., 411 (*December Term,* 1866). This court then held, in a case arising under a California statute, giving a lien against a domestic vessel in favor of a material man, and authorizing proceedings *in rem* to enforce it, that the contract was maritime, and therefore exclusively within the judicial cognizance of the United States courts, saving to suitors the common law remedies, and that the proceeding *in rem* not being a common law remedy, was not saved to suitors in the State courts.

In the *Hine* v. *Trevor,* 4 Wall., 555 (*Dec. Term,* 1866), a case of marine tort (collision), in respect to which the statute of Iowa gave a remedy by proceedings *in rem,* the court affirmed the doctrine of the *Moses Taylor,* and held that the grant of original admiralty jurisdiction by the Act of 1789 is exclusive, and that State statutes which attempt to confer upon State

courts a remedy for marine contracts, or torts, by proceedings strictly *in rem*, are void.

In the *Rock Island Bridge*, 6 Wall., 213 (Dec. Term, 1867), the court held, in accordance with all the previous decisions, that the admiralty, when it has jurisdiction of the cause, may proceed *in personam*, and when the cause *is the subject of a maritime lien*, may also proceed *in rem*, but no proceeding *in rem* could be allowed in admiralty unless a maritime lien existed, and that "the lien and the proceeding *in rem* are therefore correlative—where one exists, the other can be taken and NOT OTHERWISE."

*The Belfast*, 7 Wall., 624 (*Dec. Term*, 1868), was a case in which a statute of Alabama, giving liens on domestic vessels for supplies and for debts contracted by the master, &c., and authorizing proceedings *in rem* to enforce them was held unconstitutional and void. The several decisions of this court on the subject of admiralty jurisdiction are reviewed, and the doctrine reaffirmed that the admiralty jurisdiction of the federal courts, as conferred by the Constitution of the United States and the laws of Congress, depends in cases of contract, on the question whether the *contract* is *maritime*, and in cases of tort, on locality; and that the jurisdiction in matters of contract was coextensive with that in cases of marine torts, and embraced all navigable waters of the United States, and is exclusive in all cases where a maritime lien is to be enforced; and the court say, per CLIFFORD, J., "Wherever a *maritime lien* arises, the injured party may pursue his remedy, whether for a breach of a maritime contract or for a maritime tort, by a suit *in rem* or by a suit *in personam*, at his election," but "authority does not exist in the State court to hear and determine a suit *in rem* in admiralty to enforce a maritime lien. SUCH A LIEN DOES NOT ARISE *in a contract for materials and supplies furnished to a vessel in her home po. t;* and in respect to such contracts, it is competent for the States, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulation prescribing the mode of their enforcement."

*Note.*—That here, as in the case of the *St. Lawrence, supra*, the power of the States to *create the lien* is conceded, notwithstanding the previous decision of the *Moses Taylor v. The Hine and Trevor*, that they had no power to enforce it by direct proceedings *in rem*. Judge CLIFFORD, like C. J. TANEY, treats the power of the State to create the *lien* as "undoubted," irrespective of the question of the mode of its enforcement.

Subsequently to these decisions by which *domestic vessels* were freed from the operation of direct process *in rem*, in favor of material men, this court had occasion to review the principles and grounds upon which the maritime lien existing in favor of material men *on foreign vessels* depended. The result of this review was that the rule was definitely settled, as expressed in the case of the *Grapeshot* (*December Term*, 1869), 9 Wall., 129, p. 141; that the lien can be enforced on due proof that a necessity for the repairs or supplies existed, and that credit was given to the vessel.

*See The Grapeshot*, 9 Wall., 141.
*The Lulu*, 10 Wall., 192.
*The Kalorama*, 10 Wall., 204.
*The Custer*, 10 Wall., 215.

In this last cited group of cases relating to the maritime lien in favor of material men on foreign vessels, the court take occasion to reiterate and emphasize the doctrine that in the case of domestic vessels no such lien exist. Mr. Justice CLIFFORD, in the opinion in the *Kalorama* (10 Wall., 204), states the distinction and traces its history as follows:

"Some of the Federal courts, immediately after their organization, under the Judiciary Act, decided that repairs made and supplies furnished to a ship, if made and furnished on the credit of the ship, were a lien upon the ship whether she was at the time in her home port or in a foreign port. Other district judges were of opinion that a maritime lien did not arise if the repairs were made and the supplies were furnished in the home port of the vessel, and some uncertainty, for a time, prevailed upon the subject until the same was examined by the court, when the question was set at rest (*The Gen. Smith*, 4

Wheat., 443). * * Where repairs had been made and supplies furnished to a foreign ship, or to a ship in a port of the State to which she does not belong, the general maritime law, said Judge Story, following the civil law, gives the party a lien on the ship itself for security, and he may well maintain a suit *in rem* in the Admiralty to enforce his right. Many of the rules of the general maritime law are doubtless drawn from the civil law; but it is not quite correct to say that the maritime law of the United States, as laid down in that case, follows the civil law in respect to the lien conceded to the shipwright and tradesman who make repairs and furnish supplies to ships engaged in commerce and navigation, as the civil law extends that privilege to such repairers and furnishers, without any such distinction between domestic and foreign vessels as that which is constantly maintained in the decisions of this court."

A most important decision followed in 1870:

*Leon* v. *Galceran*, 11 Wall, 185 (Dec. Term, 1870). This was a suit for seaman's wages in the State court of Louisiana under a statute giving a privilege by writ of sequestration operating as an attachment on mesne process, and not as a direct proceeding *in rem* against property alone as an "offending thing," and under this writ the vessel was seized. This court sustained the proceeding, as a common law remedy saved by the judiciary act to the suitor—the sequestration operating not as an enforcement *in rem* of a maritime lien, but as an attachment to bring the vessel under the dominion of the State court for the purpose of subjecting it to judgment—and said per CLIFFORD, J., referring to the previous cases of the *Moses Taylor*, the *Hine* v. *Trevor*, and the *Belfast*; "Common law remedies are not competent to enforce a maritime lien by a proceeding *in rem*, and consequently the original jurisdiction to enforce such a lien by such a mode of proceeding is exclusively in the District courts, which is precisely what was decided in each of the three cases to which reference is made, and the precise language of the opinion in the *Belfast* is repeated: "Authority therefore, does not exist," &c. (*compare* 11 *Wall, p.* 192, *with* 7 *Wall, p.* 645).

It will be seen that this case establishes the right of the States, as conceded in the *St. Lawrence* and the *Belfast*, to create liens in cases of maritime contract and to enforce them by specific remedies, so long as they do not attempt to enforce maritime liens by direct process *in rem*.

In *ex parte McNeil*, 13 Wall, 226 (*December Term*, 1871), a libel *in personam* filed by a New York Sandy Hook pilot, to recover off-shore pilotage, the rate of which was prescribed by a New York statute, was sustained, and the vessel held to have been properly attached, in the absence of the owners, on the ground that the contract for pilotage was maritime and properly cognizable in the U. S. District Court, and that the sum fixed by the State law could be recovered. There was no question of marttime lien or process in the case.

The decisions of this court adverse to the power of the States to enforce maritime contracts by direct proceedings *in rem* were followed in New York, in the case of the *Josephine* (48 N. Y., 19), condemning such proceedings to enforce a lien by material men for supplies, on the ground that the contract was maritime; of *Sheppard* v. *Steel*, 43 N. Y., 52, sustaining such proceedings to enforce a lien of a shipwright for building the hull of a vessel, on the ground that this contract was not maritime; and *Brookman* v. *Hamill*, 43 N. Y., 534, holding that a claim for wharfage was a maritime contract, and therefore, exclusively cognizable in the admiralty, and could not be enforced by a direct proceeding *in rem* in a State court.

In this state of the decisions, the material men having no longer the privilege of direct proceeding *in rem*, either by municipal or maritime law, this court, at December Term, 1872, again amended Rule XII, to read as follows:

"Rule XII.—In all suits by material men, for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*."

This rule was promulgated May 6, 1872.

*See* 13 *Wall*, p. 14.

This rule has not as yet been the subject of explanation or comment, either as to its bearing or its practical affect or the reasons of its promulgation in the form given to it, in any report ed case in this court.

In *Wilson* v. *Bell* (*October Term*, 1873), not yet reported; Mr. Justice CLIFFORD characterizes the want of a remedy in the admiralty of a proceeding *in rem.* in the case of domestic vessel, and the inability of the judiciary to overcome the difficulty, as *inconveniences;* and he says that these "inconveniences" have given rise to a doubt on the part of both "bench and bar," "whether the decision of the *General Smith*, that a maritime lien does not aside in the contract for repairs and supplies furnished to a domestic ship, is correct, as it is clear that the contract is a maritime one." He then suggests that as the lien in the case of foreign vessels, is only when credit is given to the ship, it is difficult to see why the same remedy may not be given in the case of domestic vessels when the credit is given to the ship, &c. But he concedes and expressly states that the rule of decision in the Federal Courts has been FOR MANY YEARS THAT A MARITIME LIEN DOES NOT EXIST IN SUCH A CASE, and the court declined to enter into the consideration of the question.

Judge CLIFFORD in the opinion last cited, does not even allude to the new rule of 1872.

The U. S. District Court and U. S. Circuit Court for the southern district of New York, have held that the rule that there is no maritime lien in favor of material men against domestic vessels has become, under the decisions of the Supreme Court, "a rule of property established for nearly fifty years," *per* BLATCHFORD, *J.*, in *Wickes* v. *The Circassian;* also that the new rule of 1872, is prospective only in its operation. *Ib.* And see also *Poole* v. *Supplies of the Edith*, per WOODRUFF, J.

## SECOND POINT.

The *General Smith* was rightly decided. The general maritime law does not give a maritime lien to material men for supplies to a vessel in her home port, and the proper limit of the jurisdiction of the admiralty courts of the United States in such cases is in their cognizance of the contract. It does not embrace the power to create a maritime lien.

I. The question relates to the extent of the jurisdiction conferred by the Constitution on the Judiciary, which extends to "all cases of admiralty and maritime jurisdiction" (*Const. Art.* 3, *Sec.* 2 *Sub.* 1), and by the Judiciary act, which declares that the district courts shall "have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it." *Act* of 1789, 1 U. S. Stats., at L., 77.

II. The claim of a material man for supplies to a domestic vessel is "a civil cause of admiralty and maritime jurisdiction," but the privilege to arrest the vessel in such a case is not a part of the general admiralty or maritime jurisdiction. The maritime lien which the general admiralty law recognizes in the case of foreign vessels is in no sense analogous to a common law lien, but is the *privilegium* of the civil law. This was not confined to the case of supplies to vessels but was granted to the producer, preserver or improver of a thing, and to one who lent money in aid of such production and improvement (*see Domat's Civil Law Cushing's Ed., secs.* 1732–1754). The general maritime law does not, however, adopt the broad rules of the civil law in this respect, but gives or denies a maritime lien or privilege on grounds to a certain extent arbitrary, but which yet rest on some recognized principle. Thus it gives a maritime lien to the mariner for wages and denies it to the master. It gives it to the wharf-owner, and denies it to the stevedore; it

gives it to the shipwright who repairs (in the case of a foreign vessel), and denies it to the shipwright who builds; it gives it to the material man in the case of supplies to a foreign vessel, and denies it in the case of a domestic vessel. In each case there is a reason for the distinction, and, most of all, in the case last cited, the presence or absence of the owner being the controlling ground of the distinction.

III. When the maritime lien or privilege has been permitted by the maritime law, in the case of domestic vessels, it has been by following, in that particular instance, the civil law, but this is not the rule by which the admiralty and maritime jurisdiction in this country is to be tested. If the assertion repeatedly made in the decisions of this court to the effect that the privilege given by the local civil laws and municipal laws of Europe and of the several States, to material men in respect to domestic vessels is not a part of the general maritime law, then a *maritime lien* cannot be arbitrarily created by a rule of court, nor even by an act of Congress.

IV. While the grant in the constitution extends the judicial power to "all cases of admiralty and maritime jurisdiction in England when the constitution was adopted" (*Waring* v. *Clark*, 5 How., 441; *The Genessee Chief*, 62 How., 443), this court has solemnly declared that "it is not as extensive as that exercised by the Continental courts organized under and governed by the principles of the civil law" (*The Belfast*, 7 Wall., 624; *Bags of Linseed*, 1 Black., 108, 113). The true limit in the case of contracts is the general maritime law, and this did not sanction a maritime lien in the case of supplies to domestic vessels. Such liens were the creation of the local civil law, and when allowed in admiralty, it was by analogy with the civil law, and not by force of the general maritime law.

*See cases under First Point.*

V. The precise distinction for which we contend, between jurisdiction to enforce a maritime contract and power to enforce a maritime lien, was taken in the case of *The Two Ellens*, 8 Moore, P. C. Rep., N. S., 398, where it was held in a controversy for priority between a mortgagee of the vessel and a material man claiming under the *Admiralty Court Acts*, of 3 & 4 Vict., ch. 65, and 24 Vict., c. 10, 1861, which expressly gave jurisdiction in cases of necessaries supplied to foreign ships that, although jurisdiction was conferred by the act, no maritime lien arose or could be enforced.

*See also to same effect*, *The Pacific*, Browning & Lushington, 243.

## THIRD POINT.

Should this court now overturn the settled law, and extend the limits of the admiralty jurisdiction, so as to create a maritime lien in favor of material men, in the case of domestic vessels, it would be a purely arbitrary determination, in the interest of a special class, which is not entitled to any such extraordinary judicial favor at the hands of this court, which has declared that "liens on vessels encumber commerce," and are not to be favored.

*People's Ferry Co.* v. *Beers*, 20 *How.*, 393.

I. The argument from "inconvenience" proves nothing. Distress for rent was a convenience to landlords, but has not, in the most civilized communities, been retained for their benefit. The inconvenience is no greater to the material man than to the stevedore, or the shipbuilder; nor is it greater than in the case of innumerable artificers and laborers on shore, for whom no monopoly or privilege

has been imported from the civil law courts of Continental Europe. When a ship is in her home port where her owner resides, the material man runs no risk if he deals with a solvent owner, and if he desires the security of the ship that may be given by hypothecation. In practice, the material man looks to the owner in the first instance, and only resorts to the vessel in extremity.

## FOURTH POINT.

The power of the States to create liens in favor of material men for supplies to domestic vessels, and to enforce them by attachment or sequestration applicable to the general property of the owners, including the vessel itself, is not questioned by this court, and is a sufficient protection to the material man.

The sole restriction on the power of the States imposed by the decisions of the court, reviewed under the First Point, relates to the use of the Admiralty process *in rem.* against the vessel *in specie*, as "an offending thing."

See *Leon* v. *Galceran*, 11 Wall, 185.

## FIFTH POINT.

It is claimed that inasmuch as the enforcement of the lien is a question of process and not of jurisdiction, the 12th Admiralty rule, as amended, simply gives a further and incidental remedy in cases of maritime contract. But the decision in the *St. Lawrence* (1 Black, 522), is only to the effect that the use of the Admiralty process *in rem*

to enforce the lien given by the local law, was a question of process in the discretion of the court, and not of jurisdiction, the Federal court having original jurisdiction of the contract, independent of the local law. But this court has invariably held, as matter of jurisdiction, that in the enforcement of maritime contracts aside from the local law, where no maritime lien exists, there no process *in rem* can issue.

*See cases cited under First Point; see also The Two Ellens*, 8 Moore P. C., N. S., 398.

> To hold otherwise now would be not merely to permit a new use of the process *in rem*, but to create a new maritime lien. The remarks of Lord ELLENBOROUGH, in *Hussey* v. *Christie*, 9 East., 426, denying the lien of a master for money expended in repairs during the voyage, are in point: "It is admitted that there is no case where such a lien has been adjudged to exist. And though it be said that *there must be a beginning of liens*, yet I disclaim the right of originating it now, nor can I, in the absence of all authority, create a lien when none has ever before been allowed."

## SIXTH POINT.

The amendment of the 12th Admiralty Rule in May, 1872, cannot be held to work a change in the rule of decision of this court until its effect shall have been so declared. And whether it is intended and shall be construed as providing a new method for enforcing the maritime contracts of material men in the case of domestic vessels, by creating a maritime lien in their favor—which it must in effect do to justify the use of the

process *in rem.*, on the basis of maritime law—or substantially to reinstate the rule of 1844, and permit the process *in rem.*, where the local law gives a lien; in either case it is a change of the law, and must operate prospectively, and not retrospectively.

I. Congress having vested in the Supreme Court the power of regulating the forms and modes of proceeding in Admiralty, the rules duly made in pursuance of such authority have the force and effect of laws, the same as if expressly enacted by Congress.

*Scott* v. *Young America*, 1 New., 107.

II. It is a rule of law that no statute is to have a retrospect beyond the time of its commencement, for *nova constitutio futuris formam debet imponere, non præteritis.*

*Couch* v. *Jeffries*, 4 Burr., 2,460–2.

"Statutes are to be considered as acting prospectively, unless the contrary is declared or implied in them."

*Harvey* v. *Tyler*, 2 Wall., 328, 347.

III. It has been expressly adjudged by this Court, that the Admiralty Rule XII falls within the class of enactments which do not have a retrospective operation. *The St. Lawrence*, 1 Black, 522. The Court of Appeals of New York, in the recent case of *Brookman* v. *Hamill*, 43 N. Y., 554, say, in reference to the amendment of Rule XII, "it has been solemnly adjudged by the Supreme Court, that the amendment is *prospective only.*

See also,

*Dash* v. *Vankleck*, 7 John., 477.
*Bates* v. *Stearns*, 23 Wend., 482.
*Van Rennsselaer* v. *Livingston*, 12 Wend., 490.
*Frost* v. *Cabenos*, 18 Abb., 143.
*Ely* v. *Holton*, 15 N. Y., 595.
*U. S.* v. *Heth*, 3 *Cr.*, 399.

IV. The transactions of commerce based on the "RULE OF PROPERTY," of fifty years standing, that no maritime lien exists in favor of material men against domestic vessels, have created vested rights and titles which should not be disturbed. If the rule is changed it should be only as respect the future.

## SEVENTH POINT.

On the principle of *stare decisis*, as well as on the established rules of maritime law, this court should refuse to sanction the claim of a maritime lien for supplies furnished to a ship in her home port, or to exercise jurisdiction in such cases by process *in rem*, and the 12th Admiralty rule should be limited accordingly.

WM. ALLEN BUTLER,
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Executrix, etc.

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y.

# Supreme Court

## OF THE UNITED STATES.

John Wilson et al.,
Appellants,

*vs.*

Jesse K. Bell et al.,
Appellees.

Catherine A. Rodd et al.,
Appellants,

*vs.*

Henry G. Heartt,
Appellees.

**Brief and Points submitted by leave of Court on behalf of mortgagee and against materialmen.**

The case of D. Freeman Poole *et al.*, *vs.* The Surplus and Remnants of the Ship *Edith*, No. 663 on the

docket of this court, involves some of the questions arising upon the above entitled appeals, and the counsel for the appellees beg to submit the following points :

The decision of the District Court for the Southern District of New York, in that case is reported in

6 National Bankruptcy Reg. 449, and the opinion of the Circuit Court in 11 Blatchf., C. C. Rep., 451.

The decision in that case was in favor of the claim of a person holding a mortgage upon the ship *Edith*, that his lien was prior to the claim of material-men for work done upon and materials furnished to the ship.

The question as to whether a person furnishing supplies to a domestic vessel in her home port, has a lien in Admiralty, enforceable by process in *rem*, or in other words, whether this court will overrule the case of the *General Smith ;* and as to the effect of State statutes, which attempt to give such a lien, and to provide a proceeding in *rem* for its enforcement, have been so fully argued that counsel do not feel justified in adding anything to the argument already made on that subject. The point we desire to present is this :

If this court should decide to overrule the case of the *General Smith*, it may and should do so only as to cases arising since the last amendment to Rule XII, and should not reverse decrees rendered in such cases upon the authority of the *General Smith.*

## POINTS.

### First.

It is conceded that in ordinary cases the decision of the court of last resort establishes—not simply what

the law is at the time that decision was rendered, but what it has, in the judgment of the court, always been. The common law maxim was, that the function of the court was *jus dicere*, not *jus dare*.

But there was another maxim equally well settled—"*Cessante ratione, cessat et ipsa lex.*" And the rule already referred to was based on the theory that the court of last resort never changed its decisions. In point of fact it rarely did. The Court of Errors of New York, for example, once refused to hear a question once decided by it, re-argued, although the court had meantime decided it differently.

But courts of last resort now recognize the fact that the decisions of their predecessors may have been wrong, and do sometimes overrule them.

Nevertheless, while they are in force, they are conclusive evidence of the law. Lawyers are bound to advise their clients accordingly, clients do act upon them in making their contracts, and inferior tribunals follow them in their decisions. They are practically just as binding as a statute.

The rule always was, that contracts made or acts done while a statute was unrepealed, must be judged according to that statute. It only remains to apply a similar rule to the decisions of the highest court, and the full measure of justice is done to all parties.

This court has already established this rule in reference to one class of cases, that of contracts made upon the faith of a decision of the highest court having jurisdiction of the subject matter.

In Gelpecke *vs.* The City of Dubuque, 1 Wallace, 175, 206, Mr. Justice Swayne, quoting in part from Chief Justice Taney, and delivering the opinion of the court, says :

"'The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered by its courts of justice, its validity and obligation cannot be impaired by any subsequent

action of legislation or decision of its courts, altering the construction of the law.'

"The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. *It is the law of this court. It rests upon the plainest principles of justice.* To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."

The same doctrine was held in Havemyer *v.* Iowa county, 3 Wallace, 294; Olcott *v.* Fond du Lac, 16 Wallace, 678; Ohio Co. *v.* Debolt, 16 Howard, 432.

This doctrine is in harmony with the well settled rule that a sale made in pursuance of a judgment is valid, alth ugh the judgment is afterwards reversed.

In a recent case, in the New York Court of Appeals, the same rule is laid down.

Harris *v.* Jex, 55 New York, 421.

The court there say (p. 424), "The plaintiff had a right to repose upon the decision of the highest judicial tribunal in the land. It was, as applied to the relations between these parties and to this case, the law, and not the mere evidence of the law. Respect for the decisions of courts is a duty inculcated by writers upon the law, and enforced by considerations of public policy. It is said by Kent (1 Com., 476), "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it." The transactions of life would be involved in great and distressing perplexity and uncertainty if the maxim quoted" (*ignorantia juris non excusat*) is to be applied and extended to cases like this."

If further authority be needed, it is to be found in the sixth of Lord Bacon's Ordinances, when he was chancellor:

"If the construction of an act of parliament hath for a long time gone one way in general opinion and reputation, and after, by a later judgment, hath been controlled, then relief may be given upon matter of equity for cases arising before the said judgment, because the subject was in no default."

Bacon's Works, Philadelphia ed., vol. 2, p. 479.

A similar provision was incorporated into the New York Revised Statutes, vol. 2, p. 602, § 66 (p. 624, Edmond's ed.).

The rule for which we contend is simply an application to the present circumstances of society of the analogies of the common law. This the court had always a power to do. This is, indeed, the crowning merit of the whole system, that it is not rigid like a written code, but flexible and adaptive.

1 Kent Comm., 472.

Thus, for example, the courts adjudged in the early history of our jurisprudence that the colonists brought with them only such portions of the common law of England as were adapted to their condition.

1 Kent Comm., 472, 473, notes.

Town of Pawlet *v.* Clark, 9 Cranch, 333.

## Second.

In the cases at bar, and the many which depend upon their decision, money has been loaned upon the faith of the decision in The *General Smith*. The mortgagees had a right to rely upon it and to believe that their mortgage would be a lien prior to the claims of material men. It is contended by the counsel for

the material men, that the last amendment to the Twelfth Rule indicated a disposition to change the decision in The *General Smith*. However this may be, it is believed that the principles already stated should limit the application of a decision overruling that case to mortgages made since the amendment to the Twelfth Rule.

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